



U S GENERAL SERVICES ADMINISTRATION
Office of Governmentwide Policy

MAR 19 1998

MEMORANDUM FOR THE FAR SECRETARIAT

FROM

Edward C. Loeb
EDWARD C LOEB

CHAIRMAN

CIVILIAN AGENCY ACQUISITION COUNCIL (CAAC)

SUBJECT

FAR Case 97-300, Liquidated Damages

The subject case is provided for publication of a final rule

On October 6 1997 the Defense Acquisition Regulatory (DAR) Council forwarded to the CAAC a final rule amending the FAR to clarify policy on liquidated damages and commercial item plans and to implement OFPP Policy Letter 95-1, Subcontracting Plans for Companies Supplying Commercial Items On December 17, 1997, the Civilian Agency Acquisition Council (CAAC) approved the final rule with changes, which were relayed to the DARC Additional proposed changes were provided to the DARC on January 30, 1998 By message of February 27 1998 the DARC responded to the general and specific changes recommended by the CAAC Final resolution was reached on March 18, 1998

This case involves changes to the instructions on the reverse of Standard Forms 294 and 295

The following are attached for your information

- a Approved revisions to the FAR (Attachment A)
- b Federal Register information (Attachment B)
- c Changes to SF 294 and SF 295 (Attachment C)
- d Message from DAR Staff dated March 18, 1998 (Attachment D)

This final rule also finalizes FAR Case 89-42, Liquidated Damages

Questions relating to this case may be referred to Ms Victoria Moss on (202) 501-4764

Attachments

cc Director DAR Council

1800 F Street NW Washington DC 20405-0002

Subpart 11 5--LIQUIDATED DAMAGES

11 501 General

This subpart provides policies and procedures for the use of liquidated damages clauses in solicitations and contracts for supplies services and construction [, **except for the Liquidated Damages--Subcontracting Plan clause at 52 219-16, which may be applied pursuant to 19 705-7]**

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SUBPART 19 7--SUBCONTRACTING WITH SMALL BUSINESS, SMALL DISADVANTAGED BUSINESS AND WOMEN-OWNED SMALL BUSINESS CONCERNS

19 701 Definitions

As used in this subpart--

["Commercial plan" means a subcontracting plan (including goals) that covers the offeror's fiscal year and that applies to the entire production of commercial items sold by either the entire company or a portion thereof (e g , division, plant, or product line)]

"Failure to make a good faith effort to comply with the subcontracting plan," ~~as used in this subpart,~~ means willful or intentional failure to perform in accordance with the requirements of the subcontracting plan or willful or intentional action to frustrate the plan

["Individual contract plan" means a subcontracting plan that covers the entire contract period (including option periods), applies to a specific contract, and has goals that are based on the offeror's planned subcontracting in support of the specific contract, except that indirect costs incurred for common or joint purposes may be allocated on a prorated basis to the contract]

Attachment A

[“Master plan” means a subcontracting plan that contains all the required elements of an individual contract plan, except goals, and may be incorporated into individual contract plans, provided the master plan has been approved]

"Small business subcontractor" means any concern that-

(a) In connection with subcontracts of \$10 000 or less ~~if, including its affiliates~~ **its** [has a] number of employees **[, including its affiliates, that]** does not exceed 500 persons and

(b) In connection with subcontracts exceeding \$10,000 ~~if its~~ **[has a]** number of employees or average annual receipts including its affiliates **[that]** does not exceed the size standard under ~~section~~ 19 102 for the product or service it is providing on the subcontract

' Subcontract, ~~as used in this subpart,~~ means any agreement (other than one involving an employer employee relationship) entered into by a Government prime contractor or subcontractor calling for supplies and/or services required for contract performance contract modification or subcontract

19 702 Statutory requirements

Any contractor receiving a contract for more than the simplified acquisition threshold shall agree in the contract that small business concerns small disadvantaged business concerns and women-owned small business concerns shall have the maximum practicable opportunity to participate in contract performance consistent with its efficient performance It is further the policy of the United States that its prime contractors establish procedures to ensure the timely payment of amounts due pursuant to the terms of their subcontracts with small business concerns small disadvantaged business concerns and women owned small business concerns

(a) Except as stated in paragraph (b) of this section, **[Section 8(d) of]** the Small Business Act **[(15 U S C 637(d))]** imposes the following requirements regarding subcontracting with small businesses and small business subcontracting plans

(1) In negotiated acquisitions each solicitation of offers to perform a contract or contract modification ~~which~~**[that]** individually is expected to exceed \$500 000 (\$1 000 000 for construction) and that has subcontracting possibilities[,], shall require the apparently successful offeror to submit an acceptable subcontracting plan. If the apparently successful offeror fails to negotiate a subcontracting plan acceptable to the contracting officer within the time limit prescribed by the contracting officer, the offeror will be ineligible for award.

(2) In sealed bidding acquisitions each invitation for bids to perform a contract or contract modification ~~which~~**[that]** individually is expected to exceed \$500 000 (\$1 000 000 for construction) and that has subcontracting possibilities shall require the bidder selected for award to submit a subcontracting plan. If the selected bidder fails to submit a plan within the time limit prescribed by the contracting officer, the bidder will be ineligible for award.

(b) Subcontracting plans (see subparagraphs (a)(1) and (2) of this section) are not required-

(1) From small business concerns,

(2) For personal services contracts

(3) For contracts or contract modifications that will be performed entirely outside of any State territory or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico, or

(4) For modifications to contracts **[within the general scope of the contract]** that do not contain the clause at 52.219-8 Utilization of Small, Small Disadvantaged and Women-Owned Small Business Concerns (or equivalent prior clauses **[e.g., contracts awarded before the enactment of Pub. L. 95-507]**).

(c) As stated in 15 U.S.C. 637(d)(8), any contractor or subcontractor failing to comply in good faith with the requirements of the subcontracting plan is in material breach of its contract. Further, 15 U.S.C.

637(d)(4)(F) directs that a contractor's failure to make a good faith effort to comply with the requirements of the subcontracting plan shall result in the imposition of liquidated damages

(d) ***However the mentor-protege agreement must have been approved by the Office of Small and Disadvantaged Business Utilization Office of the Deputy Under Secretary of Defense (International and Commercial Programs) DUSD(I&CP)SADBU Room 2A338 3061 Defense Pentagon Washington DC 20301 3061 (703) 695 1536 before developmental assistance costs may be credited against subcontract goals

19 703 Eligibility requirements for participating in the program

(a) To be eligible as a subcontractor under the program a concern must represent itself as a small business concern small disadvantaged business concern or a women owned small business concern

(1) To represent itself as a small business concern or a women owned small business concern a concern must meet the appropriate definition in 19 001

(2) To represent itself as a small disadvantaged business concern a concern must meet the definition in 19 001 Individuals who represent that they are members of named groups (Black Americans Hispanic Americans Native Americans Asian Pacific Americans, Subcontinent Asian Americans) may also represent themselves as socially and economically disadvantaged Individuals who are not members of named groups may also represent themselves and participate in the program as socially and economically disadvantaged if they are qualified by the SBA under the procedures in 13 CFR 124 105(c)) Concerns that are tribally-owned entities or Native Hawaiian Organizations may represent themselves as socially and economically disadvantaged if they qualify under the requirements of 13 CFR 124 112 or 13 CFR 124 113 respectively The Office of Minority Small Business and Capital Ownership Development in the SBA has the final authority to determine the eligibility of a concern to be designated as a small disadvantaged business concern and will answer inquiries from

contractors and others regarding eligibility. Formal protests of a subcontractor's eligibility as a small disadvantaged business may be initiated only by the contracting officer responsible for the prime contract or by the SBA. Such protests will be processed in accordance with 13 CFR 124.601 **[through]** 124.610. Other small business subcontractors and the prime contractor may submit information to the contracting officer in an effort to persuade the contracting officer to initiate a protest. Such protests, in order to be considered timely, must be received by the contracting officer prior to completion of performance by the intended subcontractor.

(b) A contractor acting in good faith may rely on the written representation of its subcontractor regarding the subcontractor's status **[as a small business concern, a small disadvantaged business concern, or a women-owned small business concern]**. The contractor, the contracting officer, or any other interested party can challenge a subcontractor's size status representation by filing a protest in accordance with 13 CFR 121.1601 through 121.1608. Protests challenging a subcontractor's disadvantaged status representation shall be filed in accordance with 13 CFR 124.601 through 124.610. Protests challenging a subcontractor's status as a women-owned small business concern shall be filed in accordance with Small Business Administration procedures.

19.704 Subcontracting plan requirements

(a) Each subcontracting plan required under 19.702(a)(1) and (2) must include--

(1) Separate percentage goals for using small business concerns, small disadvantaged business concerns, and women-owned small business concerns as subcontractors.

[(2) A statement of the total dollars planned to be subcontracted and a statement of the total dollars planned to be subcontracted to small, small disadvantaged and women-owned small business concerns,]

[(3) A description of the principal types of supplies and services to be subcontracted and an identification of the types planned for subcontracting to small, small disadvantaged and women-owned small business concerns,]

[(4) A description of the method used to develop the subcontracting goals,]

[(5) A description of the method used to identify potential sources for solicitation purposes,]

[(6) A statement as to whether or not the offeror included indirect costs in establishing subcontracting goals, and a description of the method used to determine the proportionate share of indirect costs to be incurred with small, small disadvantaged and women-owned small business concerns,]

{2}[7] The name of an individual employed by the offeror who will administer the offeror's subcontracting program, and a description of the duties of the individual,

{3}[8] A description of the efforts the offeror will make to ensure that small business concerns small disadvantaged business concerns and women-owned small business concerns ~~will~~ have an equitable opportunity to compete for subcontracts

{4}[9] Assurances that the offeror will include the clause at 52 219 8 Utilization of Small Small Disadvantaged and Women-Owned Small Business Concerns (see 19 708(b)) in all subcontracts that offer further subcontracting opportunities and that the offeror will require all subcontractors (except small business concerns) that receive subcontracts in excess of \$500,000 (\$1 000 000 for construction) to adopt a plan similar to the plan required by the clause at 52 219 9 Small Small Disadvantaged and Women-Owned Small Business Subcontracting Plan (see 19 708(c))

{5}[10] Assurances that the offeror will (i) cooperate in any studies or surveys as may be required (ii) submit periodic reports ~~in order to allow~~ **[so that]** the Government ~~to~~ **[can]** determine the extent of compliance by the offeror with the subcontracting plan ~~and~~ (iii) submit Standard Form (SF) 294

Subcontracting Report for Individual Contracts and SF 295 Summary Subcontract Report, ~~in~~
~~accordance with~~ [following] the instructions on the forms [or as provided in agency regulations, and
(iv) ensure that its subcontractors agree to submit SF's 294 and SF 295, and]

(6) [11] A ~~recitation~~ [description] of the types of records ~~the offeror~~ [that] will [be]
maintain[ed] ~~to demonstrate~~ [concerning] procedures adopted to comply with the requirements and
goals in the plan including establishing source lists and a description of the offeror's efforts to locate
small small disadvantaged and women-owned small business concerns and to award subcontracts to
them

(b) Contractors may establish on a plant or division wide basis a master ~~subcontracting~~ plan [(see
19 701)] ~~which~~[that] contains all the elements required by the clause at 52 219 9 Small Small
Disadvantaged and Women-Owned Small Business Subcontracting Plan except goals Master plans
shall be effective for a 3 year period after approval by the contracting officer, however it is incumbent
upon contractors to maintain and update master plans Changes required to update master plans are not
effective until approved by the contracting officer A master plan, when incorporated in an individual
plan, shall apply to that contract throughout the life of the contract

(c) For [multiyear contracts or] contracts containing options, the cumulative value of the basic
contract and all options is considered in determining whether a subcontracting plan is necessary (see
19 705-2(a)) If a plan is necessary and the offeror is submitting an individual contract plan the plan
shall contain all the elements required by 19 704(a) and shall contain separate ~~parts~~ [statements and
goals] ~~one~~ for the basic contract and ~~one~~ for each option

[(d) A commercial plan (as defined in 19 701) is the preferred type of subcontracting plan for
contractors furnishing commercial items The contractor shall--

(1) Submit the commercial plan to either (i) The first contracting officer awarding a contract subject to the plan during the contractor's fiscal year, or (ii) If the contractor has ongoing contracts with commercial plans, to the contracting officer responsible for the contract with the latest completion date The contracting officer shall negotiate the commercial plan for the Government The approved commercial plan shall remain in effect during the contractor's fiscal year for all Government contracts in effect during that period, and

(2) Submit a new commercial plan, 30 working days before the end of the fiscal year, to the contracting officer responsible for the uncompleted Government contract with the latest completion date The contractor must provide to each contracting officer responsible for an ongoing contract subject to the plan, the identity of the contracting officer that will be negotiating the new plan When the new commercial plan is approved, the contractor shall provide a copy of the approved plan to each contracting officer responsible for an ongoing contract that is subject to the plan]

19 705 Responsibilities of the contracting officer under the subcontracting assistance program

19 705-1 General support of the program

The contracting officer may encourage the development of increased subcontracting opportunities in negotiated acquisition by providing monetary incentives such as payments based on actual subcontracting achievement or award[-]fee contracting (see the clause at 52 219-10 Incentive Subcontracting Program and 19 708(c)) When using any contractual incentive provision based upon rewarding the contractor monetarily for exceeding goals in the subcontracting plan the contracting officer must ensure that (a) the goals are realistic and (b) any rewards for exceeding the goals are commensurate with the efforts the contractor would not have otherwise expended Incentive provisions

should normally be negotiated after reaching final agreement with the contractor on the subcontracting plan

19 705-2 Determining the need for a subcontracting plan

The contracting officer shall take the following actions to determine whether a proposed contractual action requires a subcontracting plan

(a) Determine whether the proposed contractual action will meet the dollar threshold in 19 702(a)(1) or (2) If the action includes options or similar provisions include their value in determining whether the threshold is met

(b) Determine whether subcontracting possibilities exist by considering relevant factors such as -

(1) Whether firms engaged in the business of furnishing the types of items to be acquired customarily contract for performance of part of the work or maintain sufficient in-house capability to perform the work and

(2) Whether there are likely to be product prequalification requirements

(c) If it is determined that there are no subcontracting possibilities the determination must be approved at a level above the contracting officer and placed in the contract file

(d) In solicitations for negotiated acquisitions the contracting officer may require the submission of subcontracting plans with initial offers or at any other time prior to award In determining when subcontracting plans should be required as well as when and with whom plans should be negotiated the contracting officer shall consider the integrity of the competitive process the goal of affording maximum practicable opportunity for small small disadvantaged and women owned small business concerns to participate and the burden placed on offerors

19 705-3 Preparing the solicitation

The contracting officer shall provide the Small Business Administration's (SBA's) resident procurement center representative, if any a reasonable period of time to review any solicitation requiring submission of a subcontracting plan and to submit advisory findings before the solicitation is issued

19 705-4 Reviewing the subcontracting plan

The contracting officer shall review the subcontracting plan for adequacy ensuring that the required information goals and assurances are included (see 19 704)

(a) No detailed standards apply to every subcontracting plan Instead the contracting officer must consider each plan in terms of the circumstances of the particular acquisition including

(1) Previous involvement of small business concerns as prime contractors or subcontractors in similar acquisitions

(2) Proven methods of involving small business concerns as subcontractors in similar acquisitions and

(3) The relative success of methods the contractor intends to use to meet the goals and requirements of the plan as evidenced by records maintained by contractors

(b) If under a sealed bid solicitation a bidder submits a plan that does not cover each of the ~~six~~ [11] required elements (see 19 704) the contracting officer shall advise the bidder of the deficiency and request submission of a revised plan by a specific date If the bidder does not submit a plan ~~which~~ [that] incorporates the ~~six~~ required elements within the time allotted the bidder shall be ineligible for award If the plan although responsive evidences the bidder's intention not to comply with its obligations under the clause at 52 219-8 Utilization of Small Small Disadvantaged and Women Owned Small Business Concerns the contracting officer may find the bidder nonresponsible

(c) In negotiated acquisitions, the contracting officer shall determine whether the plan is acceptable based on the negotiation of each of the ~~six~~ [11] elements of the plan (see 19 704) Subcontracting goals should be set at a level that the parties reasonably expect can result from the offeror expending good faith efforts to use small small disadvantaged and women owned small business subcontractors to the maximum practicable extent **[The contracting officer shall take particular care to ensure that the offeror has not submitted unreasonably low goals to minimize exposure to liquidated damages and to avoid the administrative burden of substantiating good faith efforts Additionally,]**~~P-[p]~~articular attention should be paid to the identification of steps that if taken would be considered a good faith effort No goal should be negotiated upward if it is apparent that a higher goal will significantly increase the Government's cost or seriously impede the attainment of acquisition objectives An incentive subcontracting clause (see 52 219-10 Incentive Subcontracting Program) may be used when additional and unique contract effort, such as providing technical assistance could significantly increase subcontract awards to small, small disadvantaged or women-owned small businesses

(d) In determining the acceptability of a proposed subcontracting plan the contracting officer should take the following actions

(1) **[Obtain information available from the cognizant administrative contracting office, as provided for in 19 706(a), and -E[e]valuate the offeror's past performance in awarding subcontracts for the same or similar products or services to small, small disadvantaged and women-owned small business concerns If information is not available on a specific type of product or service, evaluate the offeror's overall past performance [and consider the performance of other contractors on similar efforts]**

(2) In accordance with 15 U S C 637(d)(4)(F)(iii) ensure that the goals offered are attainable in relation to--

(i) The subcontracting opportunities available to the contractor, commensurate with the efficient and economical performance of the contract

(ii) The pool of eligible subcontractors available to fulfill the subcontracting opportunities and

(iii) The actual performance of such contractor in fulfilling the subcontracting goals specified in prior plans

[(3) Ensure that the subcontracting goals are consistent with the offeror's cost or pricing data or information other than cost or pricing data]

~~(3)~~[(4)] Evaluate the offeror's make-or-buy policy or program to ensure that it does not conflict with the offeror's proposed subcontracting plan and is in the Government's interest. If the contract involves products or services that are particularly specialized or not generally available in the commercial market, consider the offeror's current capacity to perform the work and the possibility of reduced subcontracting opportunities.

~~(4)~~[(5)] Evaluate subcontracting potential, considering the offeror's make or-buy policies or programs, the nature of the ~~products~~ [supplies] or services to be subcontracted, the known availability of small, small disadvantaged and women-owned small business concerns in the geographical area where the work will be performed, and the potential contractor's long-standing contractual relationship with its suppliers.

~~(5)~~[(6)] Advise the offeror of available sources of information on potential small, small disadvantaged and women-owned small business subcontractors, as well as any specific concerns known to be potential subcontractors. If the offeror's proposed goals are questionable, the contracting officer shall emphasize that the information should be used to develop realistic and acceptable goals.

~~(6)~~[(7)] Obtain advice and recommendations from the SBA procurement center representative (if any) and the agency small business specialist.

19 705-5 Awards involving subcontracting plans

(a) In making an award that requires a subcontracting plan, the contracting officer shall be responsible for the following

(1) Consider the contractor's compliance with the subcontracting plans submitted on previous contracts as a factor in determining contractor responsibility

(2) Assure that a subcontracting plan was submitted when required

(3) Notify the SBA resident procurement center representative of the opportunity to review the proposed contract (including the plan and supporting documentation) The notice shall be issued in sufficient time to provide the representative a reasonable time to review the material and submit advisory recommendations to the contracting officer Failure of the representative to respond in a reasonable period of time shall not delay contract award

(4) Determine any fee that may be payable if an incentive is used in conjunction with the subcontracting plan

(5) Ensure that an acceptable plan is incorporated into and made a material part of the contract

(b) Letter contracts and similar undefinitized instruments, which would otherwise meet the requirements of 19 702(a)(1) and (2) shall contain at least a preliminary basic plan addressing the requirements of 19 704 and in such cases require the negotiation of the final plan within 90 days after award or before definitization whichever occurs first

19 705-6 Postaward responsibilities of the contracting officer

After a contract or contract modification containing a subcontracting plan is awarded the contracting officer **[who approved the plan]** is responsible for the following

(a) Notifying the SBA of the award by sending a copy of the award document to the Assistant Regional Administrator for Procurement Assistance in the SBA region where the contract will be performed

(b) Forwarding a copy of each **[commercial]** plan and any associated approvals to the Assistant Regional Administrator for Procurement Assistance in the SBA region where the contractor's headquarters is located [] ~~if any company-wide plans were received from offerors of commercial products~~

(c) Giving to the assigned SBA resident procurement center representative (if any) a copy of-

(1) Any subcontracting plan submitted in response to a sealed bid solicitation and

(2) The final negotiated subcontracting plan that was incorporated into a negotiated contract or contract modification

(d) Notifying the SBA resident procurement center representative of the opportunity to review subcontracting plans in connection with contract modifications

(e) Forwarding a copy of each plan or a determination that there is no requirement for a subcontracting plan to the cognizant contract administration office

(f) Initiating action to assess liquidated damages in accordance with 19 705-7 upon a recommendation by the administrative contracting officer or receipt of other reliable evidence to indicate that such action is warranted

(g) Taking action to enforce the terms of the contract upon receipt of a notice under 19 706(a)(6) [(f)]

19 705-7 Liquidated damages

(a) Maximum practicable utilization of small small disadvantaged and women owned small business concerns as subcontractors in Government contracts is a matter of national interest with both social and economic benefits When a contractor fails to make a good faith effort to comply with a subcontracting

plan, these objectives are not achieved and 15 U S C 637(d)(4)(F) directs that liquidated damages shall be paid by the contractor

(b) The amount of damages attributable to the contractor's failure to comply shall be ~~equal to~~ an amount equal [to] the actual dollar amount by which the contractor failed to achieve each subcontract[ing] goal[] ~~or, in the case of a commercial products plan, shall be that portion of the dollar amount allocable to Government contracts by which the contractor failed to achieve each subcontract goal~~

(c) If at ~~contract~~ completion [of the basic contract or any option], or in the case of a commercial ~~products~~ plan at the close of the fiscal year for which the plan is applicable a contractor has failed to meet its subcontracting goals[, the contracting officer shall review all available information for an indication that the contractor has not made a good faith effort to comply with the plan If no such indication is found, the contracting officer shall document the file accordingly] ~~and~~ [If] the contracting officer decides in accordance with paragraph (d) of this subsection that the contractor failed to make a good faith effort to comply with its subcontracting plan the contracting officer shall give the contractor written notice specifying the failure advising the contractor of the possibility that the contractor may have to pay to the Government liquidated damages and providing a period of ~~10~~ [15 working] days (or longer period as necessary) within which to respond The notice shall give the contractor an opportunity to demonstrate what good faith efforts have been made before the contracting officer issues the final decision, and shall further state that failure of the contractor to respond may be taken as an admission that no valid explanation exists ~~When appropriate, the notice may invite the contractor to discuss the matter~~

(d) In determining whether a contractor failed to make a good faith effort to comply with its subcontracting plan a contracting officer must look to the totality of the contractor's actions consistent

with the information and assurances provided in its plan. The fact that the contractor failed to meet its subcontracting goals does not in and of itself constitute a failure to make a good faith effort. For example, notwithstanding a contractor's diligent effort to identify and solicit offers from small, small disadvantaged and women-owned small business concerns, factors such as unavailability of anticipated sources or unreasonable prices may frustrate achievement of the contractor's goals. However, when considered in the context of the contractor's total effort in accordance with its plan, the following **[, though not all inclusive,]** may be considered as ~~indicia~~ **[indicators]** of a failure to make a good faith effort: a failure to attempt to identify, contact, solicit, or consider for contract award small, small disadvantaged or women-owned small business concerns; a failure to designate **[and maintain]** a company official to administer the subcontracting program **[and monitor and enforce compliance with the plan, a failure to submit Standard Form (SF) 294, Subcontracting Report for Individual Contracts, or SF 295, Summary Subcontract Report, in accordance with the instructions on the forms or as provided in agency regulations]**; a failure to maintain records or otherwise demonstrate procedures adopted to comply with the plan **[or]** the adoption of company policies or procedures ~~which~~**[that]** have as their objectives the frustration of the objectives of the plan.

(e) If, after consideration of all the pertinent data, the contracting officer finds that the contractor failed to make a good faith effort to comply with its subcontracting plan, the contracting officer shall issue a final decision to the contractor to that effect and require the payment of liquidated damages in an amount stated. The contracting officer's final decision shall state that the contractor has the right to appeal under the clause in the contract entitled Disputes.

~~(f) With respect to commercial products plans, i.e., company-wide or division-wide subcontracting plans approved under paragraph (g) of the clause in the contract entitled Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan, the contracting~~

~~officer of the agency that originally approved the plan will exercise the functions of the contracting officer under this subsection on behalf of all agencies that awarded contracts covered by that commercial products plan~~

[(f) With respect to commercial plans approved under ~~paragraph (f) of the [clause at] 52 219-~~ 9, Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan, the contracting officer that approved the plan shall--

(1) Perform the functions of the contracting officer under this subsection on behalf of all agencies with contracts covered by the commercial plan,

(2) Determine whether or not the goals in the commercial plan were achieved and, if they were not achieved, review all available information for an indication that the contractor has not made a good faith effort to comply with the plan, and document the results of the review,

(3) If a determination is made to assess liquidated damages, in order to calculate and assess the amount of damages, the contracting officer shall ask the contractor to provide—

(i) Contract numbers for the Government contracts subject to the plan,

(ii) The total Government sales during the contractor's fiscal year, and

(iii) The amount of payments made under Government contracts subject to that plan that contributed to the contractor's total sales during the contractor's fiscal year

(4) When appropriate, assess liquidated damages on the Government's behalf, based on the pro rata share of subcontracting attributable to the Government contracts For example The contractor's total actual sales were \$50 million and its actual subcontracting was \$20 million The Government's total payments under contracts subject to the plan contributing to the contractor's total sales were \$5 million, which accounted for 10 percent of the contractor's total sales Therefore, the pro rata share of subcontracting attributable to the Government contracts would

be 10 percent of \$20 million, or \$2 million To continue the example, if the contractor failed to achieve its small business goal by 1 percent, the liquidated damages would be calculated as 1 percent of \$2 million, or \$20,000 The contracting officer shall make similar calculations for each category of small business where the contractor failed to achieve its goal and the sum of the dollars for all of the categories equals the amount of the liquidated damages to be assessed A copy of the contracting officer's final decision assessing liquidated damages shall be provided to other contracting officers with contracts subject to the commercial plan]

(g) Liquidated damages shall be in addition to any other remedies that the Government may have

[(h) Every contracting officer with a contract that is subject to a commercial plan shall include in the contract file a copy of the approved plan and a copy of the final decision assessing liquidating damages, if applicable]

19 706 Responsibilities of the cognizant administrative contracting officer

~~(a)~~ The administrative contracting officer is responsible for assisting in evaluating subcontracting plans and for monitoring, evaluating and documenting contractor performance under the clause prescribed in 19 708(b) and any subcontracting plan included in the contract The contract administration office shall provide the necessary information and advice to support the contracting officer, as appropriate by furnishing--

~~(1)~~ [(a)] Documentation on the contractor's performance and compliance with subcontracting plans under previous contracts

~~(2)~~ [(b)] Information on the extent to which the contractor is meeting the plan's goals for subcontracting with eligible small small disadvantaged and women-owned small business concerns

~~(3)~~ [(c)] Information on whether the contractor's efforts to ensure the participation of small small disadvantaged and women-owned small business concerns are in accordance with its subcontracting plan

~~(4)~~ [(d)] Information on whether the contractor is requiring its subcontractors to adopt similar subcontracting plans

~~(5)~~ [(e)] Immediate notice if during performance the contractor is failing to meet its commitments under the clause prescribed in 19 708(b) or the subcontracting plan ~~and~~

~~(6)~~ [(f)] Immediate notice and rationale if during performance the contractor is failing to comply in good faith with the subcontracting plan[, and]

[(g) Immediate notice that performance under a contract is complete, that the goals were or were not met, and if not met, whether there is any indication of a lack of a good faith effort to comply with the subcontracting plan]

~~(b) If the contractor does not comply in good faith with the subcontracting plan, the administrative contracting officer shall, upon contract completion, make appropriate recommendations that contracting officers may use for future contracts~~

19 707 The Small Business Administration's role in carrying out the program

(a) Under the program, the SBA may--

(1) Assist both Government agencies and contractors in carrying out their responsibilities with regard to subcontracting plans

(2) Review (within 5 working days) any solicitation that meets the dollar threshold in 19 702(a)(1) or (2) before the solicitation is issued

(3) Review (within 5 working days) before execution any negotiated contractual document requiring a subcontracting plan, including the plan itself, and submit recommendations to the contracting officer, which shall be advisory in nature and

(4) Evaluate compliance with subcontracting plans, either on a contract-by-contract basis or in the case of contractors having multiple contracts on an aggregate basis

(b) The SBA is not authorized to (1) prescribe the extent to which any contractor or subcontractor shall subcontract (2) specify concerns to which subcontracts will be awarded or (3) exercise any authority regarding the administration of individual prime contracts or subcontracts

19 708 Solicitation provisions and contract clauses

(a) The contracting officer shall insert the clause at 52 219-8 Utilization of Small Small Disadvantaged and Women-Owned Small Business Concerns in solicitations and contracts when the contract amount is expected to be over the simplified acquisition threshold unless--

(1) A personal services contract is contemplated (see 37 104) or

(2) The contract together with all its subcontracts is to be performed entirely outside of any State territory, or possession of the United States the District of Columbia and the Commonwealth of Puerto Rico

(b)(1) The contracting officer shall, when contracting by negotiation insert the clause at 52 219 9 Small Small Disadvantaged and Women-Owned Small Business Subcontracting Plan in solicitations and contracts that (i) offer subcontracting possibilities (ii) are expected to exceed \$500 000 (\$1 000 000 for construction of any public facility), and (iii) are required to include the clause at 52 219-8 Utilization of Small, Small Disadvantaged and Women-Owned Small Business Concerns unless the acquisition is set aside or is to be accomplished under the 8(a) program When contracting by sealed bidding rather than by negotiation the contracting officer shall use the clause with its Alternate I When

contracting by negotiation and subcontracting plans are required with initial proposals as provided for in 19 705 2(d) the contracting officer shall use the clause with its Alternate II

(2) The contracting officer shall insert the clause at 52 219 16, Liquidated Damages - Subcontracting Plan in all solicitations and contracts containing the clause at 52 219-9 Small Small Disadvantaged and Women-Owned Small Business Subcontracting Plan or **[the clause with]** its Alternate I **[or II]**

(c)(1) The contracting officer may when contracting by negotiation insert in solicitations and contracts a clause substantially the same as the clause at 52 219-10 Incentive Subcontracting Program when a subcontracting plan is required (see 19 702~~(a)(1)~~) and inclusion of a monetary incentive is in the judgment of the contracting officer necessary to increase subcontracting opportunities for small small disadvantaged and women owned small business concerns and is commensurate with the efficient and economical performance of the contract unless the conditions in paragraph (c)(3) of this section are applicable The contracting officer may vary the terms of the clause as specified in paragraph (c)(2) of this section

(2) Various approaches may be used in the development of small, small disadvantaged and women-owned small business concerns' subcontracting incentives They can take many forms from a fully quantified schedule of payments based on actual subcontract achievement to an award[-]fee approach employing subjective evaluation criteria (see paragraph (c)(3) of this section) The incentive should not reward the contractor for results other than those that are attributable to the contractor's efforts under the incentive subcontracting program

(3) As specified in paragraph (c)(2) of this section, the contracting officer may include small small disadvantaged and women owned small business subcontracting as one of the factors to be

considered in determining the award fee in a cost-plus-award-fee contract, in such cases however the contracting officer shall not use the clause at 52 219-10 Incentive Subcontracting Program

52 219-9 Small, Small Disadvantaged and Women-Owned Small Business

Subcontracting Plan

As prescribed in 19 708(b) insert the following clause

SMALL, SMALL DISADVANTAGED AND WOMEN-OWNED

SMALL BUSINESS SUBCONTRACTING PLAN (Date)

(a) This clause does not apply to small business concerns

~~(b) "Commercial product," as used in this clause, means a product in regular production that is sold in substantial quantities to the general public and/or industry at established catalog or market prices. It also means a product which, in the opinion of the Contracting Officer, differs only insignificantly from the Contractor's commercial product.~~

[(b) Definitions

As used in this clause—

“Commercial item” means a product or service that satisfies the definition of commercial item in section 2 101 of the Federal Acquisition Regulation

“Commercial plan” means a subcontracting plan (including goals) that covers the offeror’s fiscal year and that applies to the entire production of commercial items sold by either the entire company or a portion thereof (e g , division, plant, or product line)

“Individual contract plan” means a subcontracting plan that covers the entire contract period (including option periods), applies to a specific contract, and has goals that are based on the

offeror's planned subcontracting in support of the specific contract, except that indirect costs incurred for common or joint purposes may be allocated on a prorated basis to the contract

"Master plan" means a subcontracting plan that contains all the required elements of an individual contract plan, except goals, and may be incorporated into individual contract plans, provided the master plan has been approved]

"Subcontract," ~~as used in this clause,~~ means any agreement (other than one involving an employer-employee relationship) entered into by a Federal Government prime Contractor or subcontractor calling for supplies or services required for performance of the contract or subcontract

(c) The offeror upon request by the Contracting Officer, shall submit and negotiate a subcontracting plan, where applicable which separately addresses subcontracting with small business concerns with small disadvantaged business concerns and with women-owned small business concerns If the offeror is submitting an individual contract plan the plan must separately address subcontracting with small business concerns small disadvantaged business concerns and women-owned small business concerns with a separate part for the basic contract and separate parts for each option (if any) The plan shall be included in and made a part of the resultant contract The subcontracting plan shall be negotiated within the time specified by the Contracting Officer Failure to submit and negotiate the subcontracting plan shall make the offeror ineligible for award of a contract

(d) The offeror's subcontracting plan shall include the following

(1) Goals, expressed in terms of percentages of total planned subcontracting dollars for the use of small business concerns small disadvantaged business concerns and women-owned small business concerns as subcontractors The offeror shall include all subcontracts that contribute to contract performance and may include a proportionate share of products and services that are normally allocated as indirect costs

(2) A statement of--

(i) Total dollars planned to be subcontracted **[for an individual contract plan, or the offeror's total projected sales, expressed in dollars, and the total value of projected subcontracts to support the sales for a commercial plan]**

(ii) Total dollars planned to be subcontracted to small business concerns,

(iii) Total dollars planned to be subcontracted to small disadvantaged business concerns and

(iv) Total dollars planned to be subcontracted to women-owned small business concerns

(3) A description of the principal types of supplies and services to be subcontracted and an identification of the types planned for subcontracting to (i) small business concerns (ii) small disadvantaged business concerns and (iii) women-owned small business concerns

(4) A description of the method used to develop the subcontracting goals in paragraph (d)(1) of this clause

(5) A description of the method used to identify potential sources for solicitation purposes (e g existing company source lists the Procurement Automated Source System (PASS) of the Small Business Administration the National Minority Purchasing Council Vendor Information Service the Research and Information Division of the Minority Business Development Agency in the Department of Commerce or small small disadvantaged and women-owned small business concerns trade associations) A firm may rely on the information contained in PASS as an accurate representation of a concern's size and ownership characteristics for purposes of maintaining a small business source list A firm may rely on PASS as its small business source list Use of the PASS as its source list does not relieve a firm of its responsibilities (e g outreach assistance counseling publicizing subcontracting opportunities) in this clause

(6) A statement as to whether or not the offeror included indirect costs in establishing subcontracting goals and a description of the method used to determine the proportionate share of indirect costs to be incurred with (i) small business concerns (ii) small disadvantaged business concerns and (iii) women-owned small business concerns

(7) The name of the individual employed by the offeror who will administer the offeror's subcontracting program and a description of the duties of the individual

(8) A description of the efforts the offeror will make to assure that small small disadvantaged and women owned small business concerns have an equitable opportunity to compete for subcontracts

(9) Assurances that the offeror will include the clause in this contract entitled "Utilization of Small, Small Disadvantaged And Women-Owned Small Business Concerns" in all subcontracts that offer further subcontracting opportunities and that the offeror will require all subcontractors (except small business concerns) ~~who~~**[that]** receive subcontracts in excess of \$500 000 (\$1 000 000 for construction of any public facility) to adopt a **[subcontracting]** plan ~~similar to the plan agreed to by the offeror~~ **[that complies with the requirements of this clause]**

(10) Assurances that the offeror will (i) Cooperate in any studies or surveys as may be required (ii) Submit periodic reports ~~in order to allow~~ **[so that]** the Government ~~to~~ **[can]** determine the extent of compliance by the offeror with the subcontracting plan (iii) Submit Standard Form (SF) 294, Subcontracting Report for Individual Contracts and/or SF 295 Summary Subcontract Report ~~in accordance with~~ **[following]** the instructions on the forms **[or as provided in agency regulations,]** and (iv) Ensure that its subcontractors agree to submit ~~Standard Forms 294 and 295~~ **[SF's 294 and 295]**

(11)] A ~~recitation~~ **[description]** of the types of records ~~the offeror~~ **[that]** will **[be]** maintain**[ed]** ~~to demonstrate~~ **[concerning]** procedures that have been adopted to comply with the requirements and goals in the plan including establishing source lists and a description of **[the offeror's]** ~~its~~ efforts to

locate small small disadvantaged and women-owned small business concerns and award subcontracts to them. The records shall include at least the following (on a plant-wide or company wide basis unless otherwise indicated)

(i) Source lists (e.g., PASS), guides, and other data that identify small small disadvantaged and women-owned small business concerns

(ii) Organizations contacted in an attempt to locate sources that are small small disadvantaged or women-owned small business concerns

(iii) Records on each subcontract solicitation resulting in an award of more than \$100,000 indicating (A) Whether small business concerns were solicited and if not, why not; (B) Whether small disadvantaged business concerns were solicited and if not, why not; (C) Whether women-owned small business concerns were solicited and if not, why not; and (D) If applicable, the reason award was not made to a small business concern

(iv) Records of any outreach efforts to contact—(A) trade associations; (B) business development organizations; and (C) conferences and trade fairs to locate small small disadvantaged and women-owned small business sources

(v) Records of internal guidance and encouragement provided to buyers through (A) workshops, seminars, training, etc., and (B) monitoring performance to evaluate compliance with the program's requirements

(vi) On a contract-by-contract basis, records to support award data submitted by the offeror to the Government, including the name, address, and business size of each subcontractor. Contractors having ~~company or division-wide annual~~ [commercial] plans need not comply with this requirement

(e) In order to effectively implement this plan to the extent consistent with efficient contract performance, the Contractor shall perform the following functions:

(1) Assist small small disadvantaged and women-owned small business concerns by arranging solicitations time for the preparation of bids quantities specifications and delivery schedules so as to facilitate the participation by such concerns Where the e[C]ontractor's lists of potential small small disadvantaged and women-owned small business subcontractors are excessively long reasonable effort shall be made to give all such small business concerns an opportunity to compete over a period of time

(2) Provide adequate and timely consideration of the potentialities of small small disadvantaged and women owned small business concerns in all "make or buy" decisions

(3) Counsel and discuss subcontracting opportunities with representatives of small small disadvantaged and women-owned small business firms

(4) Provide notice to subcontractors concerning penalties and remedies for misrepresentations of business status as small, small disadvantaged or women-owned small business for the purpose of obtaining a subcontract that is to be included as part or all of a goal contained in the Contractor's subcontracting plan

(f) A master ~~subcontracting~~ plan on a plant or division wide basis ~~which~~[that] contains all the elements required by paragraph (d) of this clause, except goals may be incorporated by reference as a part of the subcontracting plan required of the offeror by this clause provided (1) the master plan has been approved (2) the offeror ensures that the master plan is updated as necessary and provides copies of the approved master plan including evidence of its approval to the Contracting Officer and (3) goals and any deviations from the master plan deemed necessary by the Contracting Officer to satisfy the requirements of this contract are set forth in the individual subcontracting plan

~~(g)(1) If a commercial product is offered, the subcontracting plan required by this clause may relate to the offeror's production generally, for both commercial and noncommercial products,~~

~~rather than solely to the Government contract—In these cases, the offeror shall, with the concurrence of the Contracting Officer, submit one company wide or division wide annual plan—~~

~~——(2) The annual plan shall be reviewed for approval by the agency awarding the offeror its first prime contract requiring a subcontracting plan during the fiscal year, or by an agency satisfactory to the Contracting Officer—~~

~~——(3) The approved plan shall remain in effect during the offeror's fiscal year for all of the offeror's commercial products—~~

[(g) A commercial plan is the preferred type of subcontracting plan for contractors furnishing commercial items The commercial plan shall relate to the offeror's planned subcontracting generally, for both commercial and Government business, rather than solely to the Government contract Commercial plans are also preferred for subcontractors that provide commercial items under a prime contract, whether or not the prime contractor is supplying a commercial item]

(h) Prior compliance of the offeror with other such subcontracting plans under previous contracts will be considered by the Contracting Officer in determining the responsibility of the offeror for award of the contract

(i) The failure of the Contractor or subcontractor to comply in good faith with (1) the clause of this contract entitled ' Utilization of Small Small Disadvantaged Business and Women-Owned Small Business Concerns " or (2) an approved plan required by this clause shall be a material breach of the contract

(End of clause)

Alternate I (OCT 1995) When contracting by sealed bidding rather than by negotiation substitute the following paragraph (c) for paragraph (c) of the basic clause

(c) The apparent low bidder, upon request by the Contracting Officer, shall submit a subcontracting plan where applicable which separately addresses subcontracting with small business concerns with small disadvantaged business concerns and with women-owned small business concerns. If the bidder is submitting an individual contract plan, the plan must separately address subcontracting with small business concerns, small disadvantaged business concerns and women-owned small business concerns with a separate part for the basic contract and separate parts for each option (if any). The plan shall be included in and made a part of the resultant contract. The subcontracting plan shall be submitted within the time specified by the Contracting Officer. Failure to submit the subcontracting plan shall make the bidder ineligible for the award of a contract.

Alternate II (MAR 1996) As prescribed in 19 708(b)(1) substitute the following paragraph (c) for paragraph (c) of the basic clause

(c) Proposals submitted in response to this solicitation shall include a subcontracting plan which separately addresses subcontracting with small business concerns, small disadvantaged business concerns and women owned small business concerns. If the offeror is submitting an individual contract plan, the plan must separately address subcontracting with small business concerns, small disadvantaged business concerns and women-owned small business concerns with a separate part for the basic contract and separate parts for each option (if any). The plan shall be included in and made a part of the resultant contract. The subcontracting plan shall be negotiated within the time specified by the Contracting Officer. Failure to submit and negotiate a subcontracting plan shall make the offeror ineligible for award of a contract.

* * * * *

52 219-16 Liquidated Damages--Subcontracting Plan

As prescribed in 19 708(b)(2) insert the following clause

LIQUIDATED DAMAGES--SUBCONTRACTING PLAN (OCT 1995)

(a) "Failure to make a good faith effort to comply with the subcontracting plan ' as used in this clause means a willful or intentional failure to perform in accordance with the requirements of the subcontracting plan approved under the clause in this contract entitled "Small Small Disadvantaged and Women-Owned Small Business Subcontracting Plan," or willful or intentional action to frustrate the plan

(b) **[Performance shall be measured by applying the percentage goals to the total actual subcontracting dollars or, if a commercial plan is involved, to the pro rata share of actual subcontracting dollars attributable to Government contracts covered by the commercial plan]** If at contract completion or in the case of a commercial ~~product~~ plan at the close of the fiscal year for which the plan is applicable the Contractor has failed to meet its subcontracting goals and the Contracting Officer decides in accordance with paragraph (c) of this clause that the Contractor failed to make a good faith effort to comply with its subcontracting plan established in accordance with the clause in this contract entitled Small Small Disadvantaged and Women Owned Small Business Subcontracting Plan ' the Contractor shall pay the Government liquidated damages in an amount stated The amount of probable damages attributable to the Contractor's failure to comply shall be an amount equal to the actual dollar amount by which the Contractor failed to achieve each subcontract goal[] ~~or, in the case of a commercial products plan, that portion of the dollar amount allocable to Government contracts by which the Contractor failed to achieve each subcontract goal~~

(c) Before the Contracting Officer makes a final decision that the Contractor has failed to make such good faith effort the Contracting Officer shall give the Contractor written notice specifying the failure and permitting the Contractor to demonstrate what good faith efforts have been made **[and to discuss the matter]** Failure to respond to the notice may be taken as an admission that no valid explanation

exists. If, after consideration of all the pertinent data, the Contracting Officer finds that the Contractor failed to make a good faith effort to comply with the subcontracting plan, the Contracting Officer shall issue a final decision to that effect and require that the Contractor pay the Government liquidated damages as provided in paragraph (b) of this clause.

(d) With respect to commercial ~~product plans — i.e., company-wide or division-wide subcontracting plans approved under paragraph (g) of the clause in this contract entitled, “Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan”, the Contracting Officer of the agency that originally approved the plan will exercise the functions of the Contracting Officer under this clause on behalf of all agencies that awarded contracts covered by that commercial product plan~~ [, the Contracting Officer who approved the plan will perform the functions of the Contracting Officer under this clause on behalf of all agencies with contracts covered by the commercial plan]

(e) The Contractor shall have the right of appeal under the clause in this contract entitled “Disputes from any final decision of the Contracting Officer”.

(f) Liquidated damages shall be in addition to any other remedies that the Government may have.

(End of clause)

(Billing Code 6820-34-P)

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 11, 19, 52, and 53

[FAR Case 97-300]

Federal Acquisition Regulation;
Liquidated Damages

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final Rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to clarify policy on liquidated damages and commercial subcontracting plans and to implement OFPP Policy Letter 95-1, Subcontracting Plans for Companies Supplying Commercial Items. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993. This is not a major rule under 5 U.S.C. 804.

SUPPLEMENTARY INFORMATION:

ATCH B

A. BACKGROUND

An interim rule, under FAR Case 89-042 (Liquidated Damages), was published on July 21, 1989 (54 FR 30708), to require a prime contractor to pay liquidated damages upon a finding of a lack of good faith effort to meet small business subcontracting goals. This rule implemented Section 304 of the Business Opportunity Development Reform Act of 1988, Pub. L. 100-656.

A proposed rule containing revisions to the interim rule was published on April 11, 1997 (62 FR 17960). The revisions in the proposed rule resulted from the public comments received on the interim rule, and from the requirements of OFPP Policy Letter 95-1, Subcontracting Plans for Companies Supplying Commercial Items.

Eight sources submitted comments in response to the proposed rule. All comments were considered in developing the final rule.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because small business concerns are exempt from subcontracting plan requirements.

C. Paperwork Reduction Act

The Paperwork Reduction Act (Public Law 104-13) ~~is~~ ^{does not} ~~deemed to~~ apply because the final rule ^{does not change existing} ~~contains~~ information collection requirements. ~~Therefore, a revised burden estimate for Clearance 9000-0007 was submitted to the Office of Management and Budget and was approved through~~

List of Subjects in 48 CFR Parts 11, 19, 52, and 53

Government procurement.

SUBCONTRACTING REPORT FOR INDIVIDUAL CONTRACTS

(See instructions on reverse)

OMB No.: 9000-0006
Expires: 03/31/98

Public reporting burden for this collection of information is estimated to average 3 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the FAR Secretariat (MVR), Federal Acquisition Policy Division, GSA, Washington, DC 20405.

1. CORPORATION, COMPANY OR SUBDIVISION COVERED			3. DATE SUBMITTED	
COMPANY NAME			4. REPORTING PERIOD FROM INCEPTION OF CONTRACT THRU: <input type="checkbox"/> MAR 31 <input type="checkbox"/> SEPT 30 YEAR	
STREET ADDRESS				
CITY	d. STATE	e. ZIP CODE		
CONTRACTOR IDENTIFICATION NUMBER			5. TYPE OF REPORT <input type="checkbox"/> REGULAR <input type="checkbox"/> FINAL <input type="checkbox"/> REVISED	

6. ADMINISTERING ACTIVITY (Please check applicable box)

<input type="checkbox"/> ARMY	<input type="checkbox"/> GSA	<input type="checkbox"/> NASA
<input type="checkbox"/> NAVY	<input type="checkbox"/> DOE	<input type="checkbox"/> OTHER FEDERAL AGENCY (Specify)
<input type="checkbox"/> AIR FORCE	<input type="checkbox"/> DEFENSE LOGISTICS AGENCY	

7. REPORT SUBMITTED AS (Check one and provide appropriate number)		8. AGENCY OR CONTRACTOR AWARDED CONTRACT	
<input type="checkbox"/> PRIME CONTRACTOR	PRIME CONTRACT NUMBER	a. AGENCY'S OR CONTRACTOR'S NAME	
<input type="checkbox"/> SUBCONTRACTOR	SUBCONTRACT NUMBER	b. STREET ADDRESS	
DOLLARS AND PERCENTAGES IN THE FOLLOWING BLOCKS: <input type="checkbox"/> DO INCLUDE INDIRECT COSTS <input type="checkbox"/> DO NOT INCLUDE INDIRECT COSTS		c. CITY	d. STATE e. ZIP CODE

SUBCONTRACT AWARDS

TYPE	CURRENT GOAL		ACTUAL CUMULATIVE	
	WHOLE DOLLARS	PERCENT	WHOLE DOLLARS	PERCENT
10a. SMALL BUSINESS CONCERNS (Include SDB, WOSB, HBCU/MI) (Dollar Amount and Percent of 10c.)				
10b. LARGE BUSINESS CONCERNS (Dollar Amount and Percent of 10c.)				
10c. TOTAL (Sum of 10a and 10b.)		100.0%		100.0%
11. SMALL DISADVANTAGED (SDB) CONCERNS (Include HBCU/MI) (Dollar Amount and Percent of 10c.)				
12. WOMEN-OWNED SMALL BUSINESS (WOSB) CONCERNS (Dollar Amount and Percent of 10c.)				

13. REMARKS

14a. NAME OF INDIVIDUAL ADMINISTERING SUBCONTRACTING PLAN

14b. TELEPHONE NUMBER

AREA CODE NUMBER

GENERAL INSTRUCTIONS

1. This report is not required from small businesses.
2. This report is not required for commercial items for which a company-wide annual plan (i.e., a Commercial Plan) has been approved, or from large businesses in the Department of Defense (DOD) Test Program for Negotiation of Comprehensive Subcontracting Plans. The Summary Subcontract Report (SF 295) is required for contractors operating under one of these two conditions and should be submitted to the Government in accordance with the instructions on that form.
3. This form collects subcontract award data from prime contractors/subcontractors that: (a) hold one or more contracts over \$500,000 (over \$1,000,000 for construction of a public facility); and (b) are required to report subcontracts awarded to Small Business (SB), Small Disadvantaged Business (SDB), and Women-Owned Small Business (WOSB) concerns under a subcontracting plan. For the Department of Defense (DOD), the National Aeronautics and Space Administration (NASA), and the Coast Guard, this form also collects subcontract award data for Historically Black Colleges and Universities (HBCUs) and Minority institutions (MIs).
4. This report is required for each contract containing a subcontracting plan and must be submitted to the administrative contracting officer (ACO) or contracting officer if no ACO is assigned, semi-annually during contract performance for the periods ended March 31st and September 30th. A separate report is required for each contract at contract completion. Reports are due 30 days after the close of each reporting period unless otherwise directed by the contracting officer. Reports are required when due, regardless of whether there has been any subcontracting activity since the inception of the contract or since the previous report.
5. Only subcontracts involving performance within the U.S., its possessions, Puerto Rico, and the Trust Territory of the Pacific Islands should be included in this report.
6. Purchases from a corporation, company, or subdivision that is an affiliate of the prime/subcontractor are not included in this report.
7. Subcontract award data reported on this form by prime contractors/subcontractors shall be limited to awards made to their immediate subcontractors. Credit cannot be taken for awards made to lower tier subcontractors.

SPECIFIC INSTRUCTIONS

BLOCK 2: For the Contractor Identification Number, enter the nine-digit Data Universal Numbering System (DUNS) number that identifies the specific contractor establishment. If there is no DUNS number available that identifies the exact name and address entered in Block 1, contact Dun and Bradstreet Information Services at 1-800-333-0505 to get one free of charge over the telephone. Be prepared to provide the following information: (1) Company name; (2) Company address; (3) Company telephone number; (4) Line of business; (5) Chief executive officer/key manager; (6) Date the company was started; (7) Number of people employed by the company; and (8) Company affiliation.

BLOCK 4: Check only one. Note that all subcontract award data reported on this form represents activity since the inception of the contract through the date indicated in this block.

BLOCK 5: Check whether this report is a "Regular," "Final," and/or "Revised" report. A "Final" report should be checked only if the contractor has completed the contract or subcontract reported in Block 7. A "Revised" report is a change to a report previously submitted for the same period.

BLOCK 6: Identify the department or agency administering the majority of subcontracting plans.

BLOCK 7: Indicate whether the reporting contractor is submitting this report as a prime contractor or subcontractor and the prime contract or subcontract number.

BLOCK 8: Enter the name and address of the Federal department or agency awarding the contract or the prime contractor awarding the subcontract.

BLOCK 9: Check the appropriate block to indicate whether indirect costs are included in the dollar amounts in blocks 10a through 12. To ensure comparability between the goal and actual columns, the contractor may include indirect costs in the actual column only if the subcontracting plan included indirect costs in the goal.

BLOCKS 10a through 12: Under "Current Goal," enter the dollar and percent goals in each category (SB, SDB, and WOSB) from the sub-

contracting plan approved for this contract. (If the original goals agreed upon at contract award have been revised as a result of contract modifications, enter the original goals in Block 13. The amounts entered in Blocks 10a through 12 should reflect the revised goals.) Under "Actual Cumulative," enter actual subcontract achievements (dollar and percent) from the inception of the contract through the date of the report shown in Block 4. In cases where indirect costs are included, the amounts should include both direct awards and an appropriate prorated portion of indirect awards.

BLOCK 10a: Report all subcontracts awarded to SBs including subcontracts to SDBs and WOSBs. For DOD, NASA, and Coast Guard contracts, include subcontracting awards to HBCUs and MIs.

BLOCK 10b: Report all subcontracts awarded to large businesses (LBs).

BLOCK 10c: Report on this line the total of all subcontracts awarded under this contract (the sum of lines 10a and 10b).

BLOCKS 11 and 12: Each of these items is a subcategory of Block 10a. Note that in some cases the same dollars may be reported in both Block 11 and Block 12 (i.e., SDBs owned by women).

BLOCK 11: Report all subcontracts awarded to SDBs (including women-owned SDBs). For DOD, NASA, and Coast Guard contracts, include subcontract awards to HBCUs and MIs.

BLOCK 12: Report all subcontracts awarded to Women-Owned firms (including SDBs owned by women).

BLOCK 13: Enter a short narrative explanation if (a) SB, SDB, or WOSB accomplishments fall below that which would be expected using a straight-line projection of goals through the period of contract performance; or (b) if this is a final report, any one of the three goals was not met.

SPECIAL INSTRUCTIONS FOR COMMERCIAL PLANS

DEFINITIONS

1. Commercial item means a product or service that satisfies the definition of commercial item in Section 2.101 of the Federal Acquisition Regulation. *including goals*
2. Commercial plan means a subcontracting plan that covers the offeror's fiscal year and that applies to the entire production of commercial items sold by either the entire company or a portion thereof (e.g., division, plant, or product line).
3. Subcontract means a contract, purchase order, amendment, or other legal obligation executed by the prime contractor/subcontractor calling for supplies or services required for the performance of the original contract or subcontract.

4. Direct Subcontract Awards are those that are identified with the performance of one or more specific Government contract(s).

5. Indirect costs are those which, because of incurrence for common or joint purposes, are not identified with specific Government contracts; these awards are related to Government contract performance but remain for allocation after direct awards have been determined and identified to specific Government contracts.

DISTRIBUTION OF THIS REPORT

For the Awarding Agency or Contractor:

The original copy of this report should be provided to the contracting officer at the agency or contractor identified in Block 8. For contracts with DOD, a copy should also be provided to the Defense Logistics Agency (DLA) at the cognizant Defense Contract Management Area Operations (DCMAO) office.

For the Small Business Administration (SBA):

A copy of this report must be provided to the cognizant Commercial Market Representative (CMR) at the time of a compliance review. It is NOT necessary to mail the SF 294 to SBA unless specifically requested by the CMR.

SUMMARY SUBCONTRACT REPORT

(See instructions on reverse)

OMB No.: 9000-0007
Expires: 03/31/98

Public reporting burden for this collection of information is estimated to average 13 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the FAR Secretariat (MVR), Federal Acquisition Policy Division, GSA, Washington, DC 20405.

1. CORPORATION, COMPANY OR SUBDIVISION COVERED		3. DATE SUBMITTED	
COMPANY NAME		4. REPORTING PERIOD: <div style="display: flex; justify-content: space-between;"> <div> <input type="checkbox"/> OCT 1 - MAR 31 </div> <div> <input type="checkbox"/> OCT 1 - SEPT 30 </div> <div>YEAR</div> </div>	
STREET ADDRESS			
CITY	d. STATE e. ZIP CODE		
CONTRACTOR IDENTIFICATION NUMBER		5. TYPE OF REPORT <input type="checkbox"/> REGULAR <input type="checkbox"/> FINAL <input type="checkbox"/> REVISED	

6. ADMINISTERING ACTIVITY (Please check applicable box)

<input type="checkbox"/> ARMY <input type="checkbox"/> NAVY <input type="checkbox"/> AIR FORCE	<input type="checkbox"/> DEFENSE LOGISTICS AGENCY <input type="checkbox"/> NASA <input type="checkbox"/> GSA	<input type="checkbox"/> DOE <input type="checkbox"/> OTHER FEDERAL AGENCY (Specify)
--	--	---

7. REPORT SUBMITTED AS (Check one)	8. TYPE OF PLAN
<input type="checkbox"/> PRIME CONTRACTOR <input type="checkbox"/> BOTH <input type="checkbox"/> SUBCONTRACTOR	<input type="checkbox"/> INDIVIDUAL <input type="checkbox"/> COMMERCIAL IF PLAN IS A COMMERCIAL PLAN, SPECIFY THE PERCENTAGE OF THE DOLLARS ON THIS REPORT ATTRIBUTABLE TO THIS AGENCY. ▶

9. CONTRACTOR'S MAJOR PRODUCTS OR SERVICE LINES

a	c
b	d

CUMULATIVE FISCAL YEAR SUBCONTRACT AWARDS

(Report cumulative figures for reporting period in Block 4)

TYPE	WHOLE DOLLARS	PERCENT (To nearest tenth of a %)
10a. SMALL BUSINESS CONCERNS (Include SDB, WOSB, HBCU/MI) (Dollar Amount and Percent of 10c.)		
10b. LARGE BUSINESS CONCERNS (Dollar Amount and Percent of 10c.)		
10c. TOTAL (Sum of 10a and 10b.)		
1. SMALL DISADVANTAGED (SDB) CONCERNS (Dollar Amount and Percent of 10c.)		
2. WOMEN-OWNED SMALL BUSINESS (WOSB) CONCERNS (Dollar Amount and Percent of 10c.)		
3. HISTORICALLY BLACK COLLEGES AND UNIVERSITIES (HBCU) AND MINORITY INSTITUTIONS (MI) (If applicable) (Dollar Amount and Percent of 10c.)		

11. REMARKS

15. CONTRACTOR'S OFFICIAL WHO ADMINISTERS SUBCONTRACTING PROGRAM

NAME	b. TITLE	c. TELEPHONE NUMBER	
		AREA CODE	NUMBER

16. CHIEF EXECUTIVE OFFICER

NAME	c. SIGNATURE
TITLE	d. DATE

GENERAL INSTRUCTIONS

1. This report is not required from small businesses.
2. This form collects subcontract award data from prime contractors/subcontractors that: (a) hold one or more contracts over \$500,000 (over \$1,000,000 for construction of a public facility); and (b) are required to report subcontracts awarded to Small Business (SB), Small Disadvantaged Business (SDB), and Women-Owned Small Business (WOSB) concerns under a subcontracting plan. For the Department of Defense (DOD), the National Aeronautics and Space Administration (NASA), and the Coast Guard, this form also collects subcontract award data for Historically Black Colleges and Universities (HBCUs) and Minority Institutions (MIs).
3. This report must be submitted semi-annually (for the six months ended March 31st and the twelve months ended September 30th) for contracts with the Department of Defense (DOD) and annually (for the twelve months ended September 30th) for contracts with civilian agencies, except for contracts covered by an approved Commercial Plan (see special instructions in right-hand column). Reports are due 30 days after the close of each reporting period.
4. This report may be submitted on a corporate, company, or subdivision (e.g., plant or division operating on a separate profit center) basis, unless otherwise directed by the agency awarding the contract.
5. If a prime contractor/subcontractor is performing work for more than one Federal agency, a separate report shall be submitted to each agency covering only that agency's contracts, provided at least one of that agency's contracts is over \$500,000 (over \$1,000,000 for construction of a public facility) and contains a subcontracting plan. (Note that DOD is considered to be a single agency; see next instruction.)
6. For DOD, a consolidated report should be submitted for all contracts awarded by military departments/agencies and/or subcontracts awarded by DOD prime contractors. However, DOD contractors involved in construction and related maintenance and repair must submit a separate report for each DOD component.
7. Only subcontracts involving performance within the U.S., its possessions, Puerto Rico, and the Trust Territory of the Pacific Islands should be included in this report.
8. Purchases from a corporation, company, or subdivision that is an affiliate of the prime/subcontractor are not included in this report.
9. Subcontract award data reported on this form by prime contractors/subcontractors shall be limited to awards made to their immediate subcontractors. Credit cannot be taken for awards made to lower tier subcontractors.
10. See special instructions in right-hand column for Commercial Plans.

SPECIFIC INSTRUCTIONS

BLOCK 2: For the Contractor Identification Number, enter the nine-digit Data Universal Numbering System (DUNS) number that identifies the specific contractor establishment. If there is no DUNS number available that identifies the exact name and address entered in Block 1, contact Dun and Bradstreet Information Services at 1-800-333-0505 to get one free of charge over the telephone. Be prepared to provide the following information: (1) Company name; (2) Company address; (3) Company telephone number; (4) Line of business; (5) Chief executive officer/key manager; (6) Date the company was started; (7) Number of people employed by the company; and (8) Company affiliation.

BLOCK 4: Check only one. Note that March 31 represents the six months from October 1st and that September 30th represents the twelve months from October 1st. Enter the year of the reporting period.

BLOCK 5: Check whether this report is a "Regular," "Final," and/or "Revised" report. A "Final" report should be checked only if the contractor has completed all the contracts containing subcontracting plans awarded by the agency to which it is reporting. A "Revised" report is a change to a report previously submitted for the same period.

BLOCK 6: Identify the department or agency administering the majority of subcontracting plans.

BLOCK 7: This report encompasses all contracts with the Federal Government for the agency to which it is submitted, including subcontracts received from other large businesses that have contracts with the same agency. Indicate in this block whether the contractor is a prime contractor, subcontractor, or both (check only one).

BLOCK 8: Check only one. Check "Commercial Plan" only if this report is under an approved Commercial Plan. For a Commercial Plan, the contractor must specify the percentage of dollars in Blocks 10a through 13 attributable to the agency to which this report is being submitted.

BLOCK 9: Identify the major product or service lines of the reporting organization.

BLOCKS 10a through 13: These entries should include all subcontract awards resulting from contracts or subcontracts, regardless of dollar amount, received from the agency to which this report is submitted. If reporting as a subcontractor, report all subcontracts awarded under prime contracts. Amounts should include both direct awards and an appropriate prorated portion of indirect awards. (The indirect portion is based on the percentage of work being performed for the organization to which the report is being submitted in relation to other work being performed by the prime contractor/subcontractor.) Do not include awards made in support of commercial business unless "Commercial" is checked in Block 8 (see Special Instructions for Commercial Plans in right hand column).

Report only those dollars subcontracted this fiscal year for the period indicated in Block 4.

BLOCK 10a: Report all subcontracts awarded to SBs including subcontracts to SDBs and WOSBs. For DOD, NASA, and Coast Guard contracts, include subcontracting awards to HBCUs and MIs.

BLOCK 10b: Report all subcontracts awarded to large businesses (LBs).

BLOCK 10c: Report on this line the grand total of all subcontracts (the sum of lines 10a and 10b).

BLOCKS 11 and 13: Each of these items is a subcategory of Block 10a. Note that in some cases the same dollars may be reported on both Block 11 and Block 12 (i.e., SDBs owned by women); likewise subcontracts to HBCUs or MIs should be reported on both Block 11 and 13.

BLOCK 11: Report all subcontracts awarded to SDBs (including women-owned SDBs). For DOD, NASA, and Coast Guard contracts, include subcontract awards to HBCUs and MIs.

BLOCK 12: Report all subcontracts awarded to Women-Owned Small Business firms (including SDBs owned by women).

BLOCK 13 (For contracts with DOD, NASA, and Coast Guard): Enter the dollar value of all subcontracts with HBCUs/MIs.

SPECIAL INSTRUCTIONS FOR COMMERCIAL PLANS

1. This report is due on October 30th each year for the previous fiscal year ended September 30th.
2. The annual report submitted by reporting organizations that have an approved company-wide annual subcontracting plan for commercial items shall include all subcontracting activity under commercial plans in effect during the year and shall be submitted in addition to the required reports for other-than-commercial items, if any.
3. Enter in Blocks 10a through 13 the total of all subcontract awards under the contractor's Commercial Plan. Show in Block 8 the percentage of this total that is attributable to the agency to which this report is being submitted. This report must be submitted to each agency from which contracts for commercial products covered by an approved Commercial Plan were received.

DEFINITIONS

1. Commercial item means a product or service that satisfies the definition of commercial item in Section 2.101 of the Federal Acquisition Regulation.
2. Commercial plan means a subcontracting plan that covers the offeror's fiscal year and that applies to the entire production of commercial items sold by either the entire company or a portion thereof (e.g., division, plant, or product line).
3. Subcontract means a contract, purchase order, amendment, or other legal obligation executed by the prime contractor/subcontractor calling for supplies or services required for the performance of the original contract or subcontract.
4. Direct Subcontract Awards are those that are identified with the performance of one or more specific Government contracts.
5. Indirect Subcontract Awards are those which, because of incurrence for common or joint purposes, are not identified with specific Government contracts; these awards are related to Government contract performance but remain for allocation after direct awards have been determined and identified to specific Government contracts.

SUBMITTAL ADDRESSES FOR ORIGINAL REPORT

For DOD Contractors, send reports to the cognizant contract administration office as stated in the contract.

For Civilian Agency Contractors, send reports to awarding agency:

1. NASA: Forward reports to NASA, Office of Procurement (HQS), [HQS] Washington, DC 20546
2. OTHER FEDERAL DEPARTMENTS OR AGENCIES: Forward report to the OSDBU Director unless otherwise provided for in instructions by the Department or Agency.

FOR ALL CONTRACTORS:

SMALL BUSINESS ADMINISTRATION (SBA): Send "info copy" to the cognizant Commercial Market Representative (CMR) at the address provided by SBA. Call SBA Headquarters in Washington, DC at (202) 205-6475 for correct address if unknown.



U.S. GENERAL SERVICES ADMINISTRATION
Office of Governmentwide Policy

OCT 16 1997

MEMORANDUM FOR CIVILIAN AGENCY ACQUISITION COUNCIL (CAAC)
MEMBERS

FROM:

Edward C. Loeb
EDWARD C. LOEB

CHAIRMAN

CIVILIAN AGENCY ACQUISITION COUNCIL

SUBJECT:

FAR Case 97-300, Liquidated Damages

The subject case is provided for consideration by the CAAC as a final rule.

By memorandum of October 6, 1997, the Defense Acquisition Regulations Council (DARC) forwarded to the CAAC a draft final rule amending the FAR to clarify policy on liquidated damages and commercial subcontracting plans and implement OFPP Policy Letter 95-1, Subcontracting Plans for Companies Supplying Commercial Items.

The FAR Staff recommends that the coverage provided by the DARC be approved with the following revisions:

Page 2 - in the definition of subcontract, retain the phrase "as used in this subpart." This phrase is necessary because Part 44 contains a different definition of subcontract. A similar change is needed in 52.219-9(b) (page 23). The DAR Staff concurs with this recommendation.

Page 3 - 19.702(b)(4), replace the proposed phrase "in-scope modifications" with the phrase "modifications within the general scope of the contract." The FAR staff recommends this change because the recommended phrase is used in Part 43, Contract Modifications, while the phrase "in-scope" is not defined or commonly used in the FAR.

Page 3 - 19.702(b)(4), retain the parenthetical "(or equivalent prior clauses)" and remove the proposed new parenthetical. This change is needed because the DARC approved change does not take into account earlier versions of the clause that were in the FAR or other agency regulations. The DAR Staff concurs with this recommendation.

SF 294 - Remove the unnecessary header "SPECIAL INSTRUCTIONS FOR COMMERCIAL PLANS"

SF 295 - Special instruction #3 for commercial plans, delete "commercial products" and insert "commercial items." Also, delete the proposed instruction for Block 14 and insert the following special instruction for commercial plans:

- 4. List in Block 14 all Federal agencies from which contracts for commercial items covered by an approved Commercial Plan were received.**

This change is necessary because:

- 1. There are other purposes for block 14 (e.g., the contractor may use it to explain why goals were not met or as a continuation of block 9). This instruction should not be set out as the only use for Block 14.**
- 2. A contractor with a commercial plan could have thousands of contract awards during the year. Reporting each of these contract awards would be a significant burden on the contractor and would provide little needed information to the Government.**
- 3. Although the DARC did not explain the purpose for the proposed change, the FAR Staff assumes it is to support the contracting officer's responsibilities in assessing liquidated damages under a subcontracting plan. In the event this situation should ever arise, data records of agencies listed on the report could be searched to locate the contracts awarded to the contractor.**

The following documents are attached for your consideration:

- A. Memorandum from the DARC dated October 6, 1997**
- B. Matrix and disposition of comments received in response to the proposed rule**

Questions may be referred to Ms. Victoria Moss on 202/501-4764, (e-mail: victoria.moss@gsa.gov; FAX: 202/501-4067).

Attachments

September 24, 1997

Baseline FAR through FAC 97-01

Subpart 11.5--LIQUIDATED DAMAGES

11.501 General.

This subpart provides policies and procedures for the use of liquidated damages clauses in solicitations and contracts for supplies, services, and construction [, **except for the Liquidated Damages--Subcontracting Plan clause at 52.219-16, which may be applied pursuant to 19.705-7].**

* * * * *

SUBPART 19.7--SUBCONTRACTING WITH SMALL BUSINESS, SMALL DISADVANTAGED BUSINESS AND WOMEN-OWNED SMALL BUSINESS CONCERNS

19.701 Definitions.

As used in this subpart--

["Commercial plan" means a subcontracting plan (including goals) that covers the offeror's fiscal year and that applies to the entire production of commercial items sold by either the entire company or a portion thereof (e.g., division, plant, or product line).]

"Failure to make a good faith effort to comply with the subcontracting plan," ~~as used in this subpart,~~ means willful or intentional failure to perform in accordance with the requirements of the subcontracting plan, or willful or intentional action to frustrate the plan.

["Individual contract plan" means a subcontracting plan that covers the entire contract period (including option periods), applies to a specific contract, and has goals that are based on the

offeror's planned subcontracting in support of the specific contract, except that indirect costs incurred for common or joint purposes may be allocated on a prorated basis to the contract.]

["Master plan" means a subcontracting plan that contains all the required elements of an individual contract plan, except goals, and may be incorporated into individual contract plans, provided the master plan has been approved.]

"Small business subcontractor" means any concern that--

(a) In connection with subcontracts of \$10,000 or less ~~if, including its affiliates, its~~ [has a] number of employees [, including its affiliates, that] does not exceed 500 persons; and

(b) In connection with subcontracts exceeding \$10,000, ~~if its~~ [has a] number of employees or average annual receipts, including its affiliates, [that] does not exceed the size standard under ~~section~~ 19.102 for the product or service it is providing on the subcontract.

"Subcontract," ~~as used in this subpart,~~ means any agreement (other than one involving an employer-employee relationship) entered into by a Government prime contractor or subcontractor calling for supplies and/or services required for contract performance, contract modification, or subcontract.

19.702 Statutory requirements.

Any contractor receiving a contract for more than the simplified acquisition threshold shall agree in the contract that small business concerns, small disadvantaged business concerns and women-owned small business concerns shall have the maximum practicable opportunity to participate in contract performance consistent with its efficient performance. It is further the policy of the United States that its prime contractors establish procedures to ensure the timely payment of amounts due pursuant to the terms of their subcontracts with small business concerns, small disadvantaged business concerns and women-owned small business concerns.

(a) Except as stated in paragraph (b) of this section, **[Section 8(d) of]** the Small Business Act **[(15 U.S.C. 637(d))]** imposes the following requirements regarding subcontracting with small businesses and small business subcontracting plans.

(1) In negotiated acquisitions, each solicitation of offers to perform a contract or contract modification, ~~which~~**[that]** individually is expected to exceed \$500,000 (\$1,000,000 for construction) and that has subcontracting possibilities~~[,]~~ shall require the apparently successful offeror to submit an acceptable subcontracting plan. If the apparently successful offeror fails to negotiate a subcontracting plan acceptable to the contracting officer within the time limit prescribed by the contracting officer, the offeror will be ineligible for award.

(2) In sealed bidding acquisitions, each invitation for bids to perform a contract or contract modification, ~~which~~**[that]** individually is expected to exceed \$500,000 (\$1,000,000 for construction) and that has subcontracting possibilities, shall require the bidder selected for award to submit a subcontracting plan. If the selected bidder fails to submit a plan within the time limit prescribed by the contracting officer, the bidder will be ineligible for award.

(b) Subcontracting plans (see subparagraphs (a)(1) and (2) of this section) are not required--

(1) From small business concerns;

(2) For personal services contracts;

(3) For contracts or contract modifications that will be performed entirely outside of any State, territory, or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico; or

(4) For **[in-scope]** modifications to contracts that do not contain the clause at 52.219-8, Utilization of Small, Small Disadvantaged and Women-Owned Small Business Concerns ~~(or equivalent prior clauses)~~ **[(or equivalent prior Defense Acquisition Regulation, Federal Procurement Regulations,**

or NASA Procurement Regulation clauses); e.g., contracts awarded before the enactment of Pub. L. 95-507].

(c) As stated in 15 U.S.C. 637(d)(8), any contractor or subcontractor failing to comply in good faith with the requirements of the subcontracting plan is in material breach of its contract. Further, 15 U.S.C. 637(d)(4)(F) directs that a contractor's failure to make a good faith effort to comply with the requirements of the subcontracting plan shall result in the imposition of liquidated damages.

(d) ***However, the mentor-protégé agreement must have been approved by the Office of Small and Disadvantaged Business Utilization, Office of the Deputy Under Secretary of Defense (International and Commercial Programs) DUSD(I&CP)SADBU, Room 2A338, 3061 Defense Pentagon, Washington, DC 20301-3061, (703) 695-1536, before developmental assistance costs may be credited against subcontract goals.

19.703 Eligibility requirements for participating in the program.

(a) To be eligible as a subcontractor under the program, a concern must represent itself as a small business concern, small disadvantaged business concern or a women-owned small business concern.

(1) To represent itself as a small business concern or a women-owned small business concern, a concern must meet the appropriate definition in 19.001.

(2) To represent itself as a small disadvantaged business concern, a concern must meet the definition in 19.001. Individuals who represent that they are members of named groups (Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent-Asian Americans) may also represent themselves as socially and economically disadvantaged. Individuals who are not members of named groups may also represent themselves, and participate in the program, as socially and economically disadvantaged if they are qualified by the SBA under the procedures in 13 CFR 124.105(c)). Concerns that are tribally-owned entities or Native Hawaiian Organizations may

represent themselves as socially and economically disadvantaged if they qualify under the requirements of 13 CFR 124.112 or 13 CFR 124.113, respectively. The Office of Minority Small Business and Capital Ownership Development in the SBA has the final authority to determine the eligibility of a concern to be designated as a small disadvantaged business concern, and will answer inquiries from contractors and others regarding eligibility. Formal protests of a subcontractor's eligibility as a small disadvantaged business may be initiated only by the contracting officer responsible for the prime contract or by the SBA. Such protests will be processed in accordance with 13 CFR 124.601 **[through]** 124.610. Other small business subcontractors and the prime contractor may submit information to the contracting officer in an effort to persuade the contracting officer to initiate a protest. Such protests, in order to be considered timely, must be received by the contracting officer prior to completion of performance by the intended subcontractor.

(b) A contractor acting in good faith may rely on the written representation of its subcontractor regarding the subcontractor's status **[as a small business concern, a small disadvantaged business concern, or a women-owned small business concern]**. The contractor, the contracting officer, or any other interested party can challenge a subcontractor's size status representation by filing a protest, in accordance with 13 CFR 121.1601 through 121.1608. Protests challenging a subcontractor's disadvantaged status representation shall be filed in accordance with 13 CFR 124.601 through 124.610. Protests challenging a subcontractor's status as a women-owned small business concern shall be filed in accordance with Small Business Administration procedures.

19.704 Subcontracting plan requirements.

(a) Each subcontracting plan required under 19.702(a)(1) and (2) must include--

(1) Separate percentage goals for using small business concerns, small disadvantaged business concerns and women-owned small business concerns as subcontractors;

[(2) A statement of the total dollars planned to be subcontracted and a statement of the total dollars planned to be subcontracted to small, small disadvantaged and women-owned small business concerns;]

[(3) A description of the principal types of supplies and services to be subcontracted and an identification of the types planned for subcontracting to small, small disadvantaged and women-owned small business concerns;]

[(4) A description of the method used to develop the subcontracting goals;]

[(5) A description of the method used to identify potential sources for solicitation purposes;]

[(6) A statement as to whether or not the offeror included indirect costs in establishing subcontracting goals, and a description of the method used to determine the proportionate share of indirect costs to be incurred with small, small disadvantaged and women-owned small business concerns;]

(2)[7] The name of an individual employed by the offeror who will administer the offeror's subcontracting program, and a description of the duties of the individual;

(3)[8] A description of the efforts the offeror will make to ensure that small business concerns, small disadvantaged business concerns and women-owned small business concerns ~~will~~ have an equitable opportunity to compete for subcontracts;

(4)[9] Assurances that the offeror will include the clause at 52.219-8, Utilization of Small, Small Disadvantaged and Women-Owned Small Business Concerns (see 19.708(b)), in all subcontracts that offer further subcontracting opportunities, and that the offeror will require all subcontractors (except small business concerns) that receive subcontracts in excess of \$500,000 (\$1,000,000 for construction) to adopt a plan similar to the plan required by the clause at 52.219-9, Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan (see 19.708(c));

~~(5)~~**[10]** Assurances that the offeror will (i) cooperate in any studies or surveys as may be required, (ii) submit periodic reports ~~in order to allow~~ **[so that]** the Government ~~to~~ **[can]** determine the extent of compliance by the offeror with the subcontracting plan, ~~and~~ (iii) submit Standard Form (SF) 294, Subcontracting Report for Individual Contracts, and SF 295, Summary Subcontract Report, ~~in accordance with~~ **[following]** the instructions on the forms **[or as provided in agency regulations, and** (iv) **ensure that its subcontractors agree to submit SF's 294 and SF 295; and]**

~~(6)~~ **[11]** A ~~recitation~~ **[description]** of the types of records ~~the offeror~~ **[that]** will **[be]** maintain~~ed~~ **[to demonstrate** **[concerning]** procedures adopted to comply with the requirements and goals in the plan, including establishing source lists; and a description of the offeror's efforts to locate small, small disadvantaged and women-owned small business concerns and to award subcontracts to them.

(b) Contractors may establish, on a plant or division-wide basis, a master ~~subcontracting~~ plan **[(see 19.701)]** ~~which~~**[that]** contains all the elements required by the clause at 52.219-9, Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan, except goals. Master plans shall be effective for a 3-year period after approval by the contracting officer; however, it is incumbent upon contractors to maintain and update master plans. Changes required to update master plans are not effective until approved by the contracting officer. A master plan, when incorporated in an individual plan, shall apply to that contract throughout the life of the contract.

(c) For **[multiyear contracts or]** contracts containing options, the cumulative value of the basic contract and all options is considered in determining whether a subcontracting plan is necessary (see 19.705-2(a)). If a plan is necessary and the offeror is submitting an individual contract plan, the plan shall contain all the elements required by 19.704(a) and shall contain separate ~~parts~~ **[statements and goals]** ~~one~~ for the basic contract and ~~one~~ for each option.

[(d) A commercial plan (as defined in 19.701) is the preferred type of subcontracting plan for contractors furnishing commercial items. The contractor shall--

(1) Submit the commercial plan to either (i) The first contracting officer awarding a contract subject to the plan during the contractor's fiscal year, or (ii) If the contractor has ongoing contracts with commercial plans, to the contracting officer responsible for the contract with the latest completion date. The contracting officer shall negotiate the commercial plan for the Government. The approved commercial plan shall remain in effect during the contractor's fiscal year for all Government contracts in effect during that period; and

(2) Submit a new commercial plan, 30 working days before the end of the fiscal year, to the contracting officer responsible for the uncompleted Government contract with the latest completion date. The contractor must provide to each contracting officer responsible for an ongoing contract subject to the plan, the identity of the contracting officer that will be negotiating the new plan. When the new commercial plan is approved, the contractor shall provide a copy of the approved plan to each contracting officer responsible for an ongoing contract that is subject to the plan.]

19.705 Responsibilities of the contracting officer under the subcontracting assistance program.

19.705-1 General support of the program.

The contracting officer may encourage the development of increased subcontracting opportunities in negotiated acquisition by providing monetary incentives such as payments based on actual subcontracting achievement or award[-]fee contracting (see the clause at 52.219-10, Incentive Subcontracting Program, and 19.708(c)). When using any contractual incentive provision based upon rewarding the contractor monetarily for exceeding goals in the subcontracting plan, the contracting officer must ensure that (a) the goals are realistic and (b) any rewards for exceeding the goals are

commensurate with the efforts the contractor would not have otherwise expended. Incentive provisions should normally be negotiated after reaching final agreement with the contractor on the subcontracting plan.

19.705-2 Determining the need for a subcontracting plan.

The contracting officer shall take the following actions to determine whether a proposed contractual action requires a subcontracting plan:

(a) Determine whether the proposed contractual action will meet the dollar threshold in 19.702(a)(1) or (2). If the action includes options or similar provisions, include their value in determining whether the threshold is met.

(b) Determine whether subcontracting possibilities exist by considering relevant factors such as--

(1) Whether firms engaged in the business of furnishing the types of items to be acquired customarily contract for performance of part of the work or maintain sufficient in-house capability to perform the work; and

(2) Whether there are likely to be product prequalification requirements.

(c) If it is determined that there are no subcontracting possibilities, the determination must be approved at a level above the contracting officer and placed in the contract file.

(d) In solicitations for negotiated acquisitions, the contracting officer may require the submission of subcontracting plans with initial offers, or at any other time prior to award. In determining when subcontracting plans should be required, as well as when and with whom plans should be negotiated, the contracting officer shall consider the integrity of the competitive process, the goal of affording maximum practicable opportunity for small, small disadvantaged and women-owned small business concerns to participate, and the burden placed on offerors.

19.705-3 Preparing the solicitation.

The contracting officer shall provide the Small Business Administration's (SBA's) resident procurement center representative, if any, a reasonable period of time to review any solicitation requiring submission of a subcontracting plan and to submit advisory findings before the solicitation is issued.

19.705-4 Reviewing the subcontracting plan.

The contracting officer shall review the subcontracting plan for adequacy, ensuring that the required information, goals, and assurances are included (see 19.704).

(a) No detailed standards apply to every subcontracting plan. Instead, the contracting officer must consider each plan in terms of the circumstances of the particular acquisition, including--

(1) Previous involvement of small business concerns as prime contractors or subcontractors in similar acquisitions;

(2) Proven methods of involving small business concerns as subcontractors in similar acquisitions; and

(3) The relative success of methods the contractor intends to use to meet the goals and requirements of the plan, as evidenced by records maintained by contractors.

(b) If, under a sealed bid solicitation, a bidder submits a plan that does not cover each of the ~~six~~ [11] required elements (see 19.704), the contracting officer shall advise the bidder of the deficiency and request submission of a revised plan by a specific date. If the bidder does not submit a plan ~~which~~ [that] incorporates the ~~six~~-required elements within the time allotted, the bidder shall be ineligible for award. If the plan, although responsive, evidences the bidder's intention not to comply with its obligations under the clause at 52.219-8, Utilization of Small, Small Disadvantaged and Women-Owned Small Business Concerns, the contracting officer may find the bidder nonresponsible.

(c) In negotiated acquisitions, the contracting officer shall determine whether the plan is acceptable based on the negotiation of each of the ~~six~~ [11] elements of the plan (see 19.704). Subcontracting goals should be set at a level that the parties reasonably expect can result from the offeror expending good faith efforts to use small, small disadvantaged and women-owned small business subcontractors to the maximum practicable extent. **[The contracting officer shall take particular care to ensure that the offeror has not submitted unreasonably low goals to minimize exposure to liquidated damages and to avoid the administrative burden of substantiating good faith efforts. Additionally,**~~P~~**[p]**articular attention should be paid to the identification of steps that, if taken, would be considered a good faith effort. No goal should be negotiated upward if it is apparent that a higher goal will significantly increase the Government's cost or seriously impede the attainment of acquisition objectives. An incentive subcontracting clause (see 52.219-10, Incentive Subcontracting Program), may be used when additional and unique contract effort, such as providing technical assistance, could significantly increase subcontract awards to small, small disadvantaged or women-owned small businesses.

(d) In determining the acceptability of a proposed subcontracting plan, the contracting officer should take the following actions:

(1) **[Obtain information available from the cognizant administrative contracting office, as provided for in 19.706(a), and** ~~E~~**[e]**valuate the offeror's past performance in awarding subcontracts for the same or similar products or services to small, small disadvantaged and women-owned small business concerns. If information is not available on a specific type of product or service, evaluate the offeror's overall past performance **[and consider the performance of other contractors on similar efforts]**.

(2) In accordance with 15 U.S.C. 637(d)(4)(F)(iii), ensure that the goals offered are attainable in relation to--

- (i) The subcontracting opportunities available to the contractor, commensurate with the efficient and economical performance of the contract;
- (ii) The pool of eligible subcontractors available to fulfill the subcontracting opportunities; and
- (iii) The actual performance of such contractor in fulfilling the subcontracting goals specified in prior plans.

[(3) Ensure that the subcontracting goals are consistent with the offeror's cost or pricing data or information other than cost or pricing data.]

~~(3)~~[(4)] Evaluate the offeror's make-or-buy policy or program to ensure that it does not conflict with the offeror's proposed subcontracting plan and is in the Government's interest. If the contract involves products or services that are particularly specialized or not generally available in the commercial market, consider the offeror's current capacity to perform the work and the possibility of reduced subcontracting opportunities.

~~(4)~~[(5)] Evaluate subcontracting potential, considering the offeror's make-or-buy policies or programs, the nature of the ~~products~~ [supplies] or services to be subcontracted, the known availability of small, small disadvantaged and women-owned small business concerns in the geographical area where the work will be performed, and the potential contractor's long-standing contractual relationship with its suppliers.

~~(5)~~[(6)] Advise the offeror of available sources of information on potential small, small disadvantaged and women-owned small business subcontractors, as well as any specific concerns known to be potential subcontractors. If the offeror's proposed goals are questionable, the contracting officer shall emphasize that the information should be used to develop realistic and acceptable goals.

~~(6)~~[(7)] Obtain advice and recommendations from the SBA procurement center representative (if any) and the agency small business specialist.

19.705-5 Awards involving subcontracting plans.

(a) In making an award that requires a subcontracting plan, the contracting officer shall be responsible for the following:

(1) Consider the contractor's compliance with the subcontracting plans submitted on previous contracts as a factor in determining contractor responsibility.

(2) Assure that a subcontracting plan was submitted when required.

(3) Notify the SBA resident procurement center representative of the opportunity to review the proposed contract (including the plan and supporting documentation). The notice shall be issued in sufficient time to provide the representative a reasonable time to review the material and submit advisory recommendations to the contracting officer. Failure of the representative to respond in a reasonable period of time shall not delay contract award.

(4) Determine any fee that may be payable if an incentive is used in conjunction with the subcontracting plan.

(5) Ensure that an acceptable plan is incorporated into and made a material part of the contract.

(b) Letter contracts and similar undefinitized instruments, which would otherwise meet the requirements of 19.702(a)(1) and (2), shall contain at least a preliminary basic plan addressing the requirements of 19.704 and in such cases require the negotiation of the final plan within 90 days after award or before definitization, whichever occurs first.

19.705-6 Postaward responsibilities of the contracting officer.

After a contract or contract modification containing a subcontracting plan is awarded, the contracting officer **[who approved the plan]** is responsible for the following:

(a) Notifying the SBA of the award by sending a copy of the award document to the Assistant Regional Administrator for Procurement Assistance in the SBA region where the contract will be performed.

(b) Forwarding a copy of each **[commercial]** plan and any associated approvals to the Assistant Regional Administrator for Procurement Assistance in the SBA region where the contractor's headquarters is located~~[.]if any company wide plans were received from offerors of commercial products.~~

(c) Giving to the assigned SBA resident procurement center representative (if any) a copy of--

(1) Any subcontracting plan submitted in response to a sealed bid solicitation; and

(2) The final negotiated subcontracting plan that was incorporated into a negotiated contract or contract modification.

(d) Notifying the SBA resident procurement center representative of the opportunity to review subcontracting plans in connection with contract modifications.

(e) Forwarding a copy of each plan, or a determination that there is no requirement for a subcontracting plan, to the cognizant contract administration office.

(f) Initiating action to assess liquidated damages in accordance with 19.705-7 upon a recommendation by the administrative contracting officer or receipt of other reliable evidence to indicate that such action is warranted.

(g) Taking action to enforce the terms of the contract upon receipt of a notice under 19.706~~(a)(6)~~ [(f)].

19.705-7 Liquidated damages.

(a) Maximum practicable utilization of small, small disadvantaged and women-owned small business concerns as subcontractors in Government contracts is a matter of national interest with both social and economic benefits. When a contractor fails to make a good faith effort to comply with a subcontracting

plan, these objectives are not achieved, and 15 U.S.C. 637(d)(4)(F) directs that liquidated damages shall be paid by the contractor.

(b) The amount of damages attributable to the contractor's failure to comply shall be ~~equal to~~ an amount equal [to] the actual dollar amount by which the contractor failed to achieve each subcontract[ing] goal[.] ~~or, in the case of a commercial products plan, shall be that portion of the dollar amount allocable to Government contracts by which the contractor failed to achieve each subcontract goal.~~

(c) If, at ~~contract~~ completion [of the basic contract or any option], or in the case of a commercial ~~products~~ plan, at the close of the fiscal year for which the plan is applicable, a contractor has failed to meet its subcontracting goals[, the contracting officer shall review all available information for an indication that the contractor has not made a good faith effort to comply with the plan. If no such indication is found, the contracting officer shall document the file accordingly.] ~~and~~ [If] the contracting officer decides in accordance with paragraph (d) of this subsection that the contractor failed to make a good faith effort to comply with its subcontracting plan, the contracting officer shall give the contractor written notice specifying the failure, advising the contractor of the possibility that the contractor may have to pay to the Government liquidated damages, and providing a period of ~~10~~ [15 working] days (or longer period as necessary) within which to respond. The notice shall give the contractor an opportunity to demonstrate what good faith efforts have been made before the contracting officer issues the final decision, and shall further state that failure of the contractor to respond may be taken as an admission that no valid explanation exists. ~~When appropriate, the notice may invite the contractor to discuss the matter.~~

(d) In determining whether a contractor failed to make a good faith effort to comply with its subcontracting plan, a contracting officer must look to the totality of the contractor's actions, consistent

with the information and assurances provided in its plan. The fact that the contractor failed to meet its subcontracting goals does not, in and of itself, constitute a failure to make a good faith effort. For example, notwithstanding a contractor's diligent effort to identify and solicit offers from small, small disadvantaged and women-owned small business concerns, factors such as unavailability of anticipated sources or unreasonable prices may frustrate achievement of the contractor's goals. However, when considered in the context of the contractor's total effort in accordance with its plan, the following **[, though not all inclusive,]** may be considered as ~~indicia~~ **[indicators]** of a failure to make a good faith effort: a failure to attempt to identify, contact, solicit, or consider for contract award small, small disadvantaged or women-owned small business concerns; a failure to designate **[and maintain]** a company official to administer the subcontracting program **[and monitor and enforce compliance with the plan; a failure to submit Standard Form (SF) 294, Subcontracting Report for Individual Contracts, or SF 295, Summary Subcontract Report, in accordance with the instructions on the forms or as provided in agency regulations]**; a failure to maintain records or otherwise demonstrate procedures adopted to comply with the plan; **[or]** the adoption of company policies or procedures ~~which~~**[that]** have as their objectives the frustration of the objectives of the plan.

(e) If, after consideration of all the pertinent data, the contracting officer finds that the contractor failed to make a good faith effort to comply with its subcontracting plan, the contracting officer shall issue a final decision to the contractor to that effect and require the payment of liquidated damages in an amount stated. The contracting officer's final decision shall state that the contractor has the right to appeal under the clause in the contract entitled Disputes.

~~(f) With respect to commercial products plans; i.e., company wide or division wide subcontracting plans approved under paragraph (g) of the clause in the contract entitled Small, Small Disadvantaged and Women Owned Small Business Subcontracting Plan, the contracting~~

~~officer of the agency that originally approved the plan will exercise the functions of the contracting officer under this subsection on behalf of all agencies that awarded contracts covered by that commercial products plan.~~

[(f) With respect to commercial plans approved under ~~paragraph (f) of the~~ [clause at] 52.219-9, Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan, the contracting officer that approved the plan shall--

(1) Perform the functions of the contracting officer under this subsection on behalf of all agencies with contracts covered by the commercial plan;

(2) Determine whether or not the goals in the commercial plan were achieved and, if they were not achieved, review all available information for an indication that the contractor has not made a good faith effort to comply with the plan, document the results of the review, and provide a copy to the other contracting officers with contracts subject to the commercial plan as listed in the "Remarks" block of the SF 295; and

(3) If a determination is made to assess liquidated damages, request that other contracting officers with contracts incorporating the plan provide the amount of payments made under their Government contracts subject to the plan that contributed to the contractor's total sales during the contractor's fiscal year, in order to calculate and assess liquidated damages on the Government's behalf. For example: The contractor's total actual sales were \$50 million and its actual subcontracting was \$20 million. The Government's total payments under contracts subject to the plan contributing to the contractor's total sales were \$5 million, which accounted for 10 percent of the contractor's total sales. Therefore, the pro rata share of subcontracting attributable to the Government contracts would be 10 percent of \$20 million, or \$2 million. To continue the example, if the contractor failed to achieve its small business goal by 1 percent, the

liquidated damages would be calculated as 1 percent of \$2 million, or \$20,000. The contracting officer shall make similar calculations for each category of small business where the contractor failed to achieve its goal and the sum of the dollars for all of the categories equals the amount of the liquidated damages to be assessed. A copy of the contracting officer's final decision assessing liquidated damages shall be provided to other contracting officers with contracts subject to the commercial plan as listed in the "Remarks" block of the SF 295.]

(g) Liquidated damages shall be in addition to any other remedies that the Government may have.

[(h) Every contracting officer with a contract that is subject to a commercial plan shall include in the contract file (1) A copy of the approved plan, (2) A copy of the determination regarding goal achievement and (if applicable) whether the contractor made a good faith effort to comply with the plan, and (3) A copy of the final decision assessing liquidating damages, if applicable.]

19.706 Responsibilities of the cognizant administrative contracting officer.

~~(a)~~ The administrative contracting officer is responsible for assisting in evaluating subcontracting plans, and for monitoring, evaluating, and documenting contractor performance under the clause prescribed in 19.708(b) and any subcontracting plan included in the contract. The contract administration office shall provide the necessary information and advice to support the contracting officer, as appropriate, by furnishing--

~~(1)~~ **[(a)]** Documentation on the contractor's performance and compliance with subcontracting plans under previous contracts;

~~(2)~~ **[(b)]** Information on the extent to which the contractor is meeting the plan's goals for subcontracting with eligible small, small disadvantaged and women-owned small business concerns;

~~(3)~~ [(c)] Information on whether the contractor's efforts to ensure the participation of small, small disadvantaged and women-owned small business concerns are in accordance with its subcontracting plan;

~~(4)~~ [(d)] Information on whether the contractor is requiring its subcontractors to adopt similar subcontracting plans;

~~(5)~~ [(e)] Immediate notice if, during performance, the contractor is failing to meet its commitments under the clause prescribed in 19.708(b) or the subcontracting plan; ~~and~~

~~(6)~~ [(f)] Immediate notice and rationale if, during performance, the contractor is failing to comply in good faith with the subcontracting plan[; and]

[(g) Immediate notice that performance under a contract is complete, that the goals were or were not met, and if not met, whether there is any indication of a lack of a good faith effort to comply with the subcontracting plan.]

~~(b) If the contractor does not comply in good faith with the subcontracting plan, the administrative contracting officer shall, upon contract completion, make appropriate recommendations that contracting officers may use for future contracts.~~

19.707 The Small Business Administration's role in carrying out the program.

(a) Under the program, the SBA may--

(1) Assist both Government agencies and contractors in carrying out their responsibilities with regard to subcontracting plans;

(2) Review (within 5 working days) any solicitation that meets the dollar threshold in 19.702(a)(1) or (2) before the solicitation is issued;

(3) Review (within 5 working days) before execution any negotiated contractual document requiring a subcontracting plan, including the plan itself, and submit recommendations to the contracting officer, which shall be advisory in nature; and

(4) Evaluate compliance with subcontracting plans, either on a contract-by-contract basis, or, in the case of contractors having multiple contracts, on an aggregate basis.

(b) The SBA is not authorized to (1) prescribe the extent to which any contractor or subcontractor shall subcontract, (2) specify concerns to which subcontracts will be awarded, or (3) exercise any authority regarding the administration of individual prime contracts or subcontracts.

19.708 Solicitation provisions and contract clauses.

(a) The contracting officer shall insert the clause at 52.219-8, Utilization of Small, Small Disadvantaged and Women-Owned Small Business Concerns, in solicitations and contracts when the contract amount is expected to be over the simplified acquisition threshold unless--

(1) A personal services contract is contemplated (see 37.104); or

(2) The contract, together with all its subcontracts, is to be performed entirely outside of any State, territory, or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

(b)(1) The contracting officer shall, when contracting by negotiation, insert the clause at 52.219-9, Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan, in solicitations and contracts that (i) offer subcontracting possibilities, (ii) are expected to exceed \$500,000 (\$1,000,000 for construction of any public facility), and (iii) are required to include the clause at 52.219-8, Utilization of Small, Small Disadvantaged and Women-Owned Small Business Concerns, unless the acquisition is set aside or is to be accomplished under the 8(a) program. When contracting by sealed bidding rather than by negotiation, the contracting officer shall use the clause with its Alternate I. When

contracting by negotiation, and subcontracting plans are required with initial proposals as provided for in 19.705-2(d), the contracting officer shall use the clause with its Alternate II.

(2) The contracting officer shall insert the clause at 52.219-16, Liquidated Damages-- Subcontracting Plan, in all solicitations and contracts containing the clause at 52.219-9, Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan, or **[the clause with]** its Alternate I.

(c)(1) The contracting officer may, when contracting by negotiation, insert in solicitations and contracts a clause substantially the same as the clause at 52.219-10, Incentive Subcontracting Program, when a subcontracting plan is required (see 19.702~~(a)~~(1)), and inclusion of a monetary incentive is, in the judgment of the contracting officer, necessary to increase subcontracting opportunities for small, small disadvantaged and women-owned small business concerns, and is commensurate with the efficient and economical performance of the contract; unless the conditions in paragraph (c)(3) of this section are applicable. The contracting officer may vary the terms of the clause as specified in paragraph (c)(2) of this section.

(2) Various approaches may be used in the development of small, small disadvantaged and women-owned small business concerns' subcontracting incentives. They can take many forms, from a fully quantified schedule of payments based on actual subcontract achievement to an award[-]fee approach employing subjective evaluation criteria (see paragraph (c)(3) of this section). The incentive should not reward the contractor for results other than those that are attributable to the contractor's efforts under the incentive subcontracting program.

(3) As specified in paragraph (c)(2) of this section, the contracting officer may include small, small disadvantaged and women-owned small business subcontracting as one of the factors to be

considered in determining the award fee in a cost-plus-award-fee contract; in such cases, however, the contracting officer shall not use the clause at 52.219-10, Incentive Subcontracting Program.

52.219-9 Small, Small Disadvantaged and Women-Owned Small Business

Subcontracting Plan.

As prescribed in 19.708(b), insert the following clause:

SMALL, SMALL DISADVANTAGED AND WOMEN-OWNED

SMALL BUSINESS SUBCONTRACTING PLAN (Date)

(a) This clause does not apply to small business concerns.

~~(b) "Commercial product," as used in this clause, means a product in regular production that is sold in substantial quantities to the general public and/or industry at established catalog or market prices. It also means a product which, in the opinion of the Contracting Officer, differs only insignificantly from the Contractor's commercial product.~~

[(b) Definitions.

As used in this clause—

“Commercial item” means a product or service that satisfies the definition of commercial item in section 2.101 of the Federal Acquisition Regulation.

“Commercial plan” means a subcontracting plan (including goals) that covers the offeror’s fiscal year and that applies to the entire production of commercial items sold by either the entire company or a portion thereof (e.g., division, plant, or product line).

“Individual contract plan” means a subcontracting plan that covers the entire contract period (including option periods), applies to a specific contract, and has goals that are based on the

offeror's planned subcontracting in support of the specific contract, except that indirect costs incurred for common or joint purposes may be allocated on a prorated basis to the contract.

"Master plan" means a subcontracting plan that contains all the required elements of an individual contract plan, except goals, and may be incorporated into individual contract plans, provided the master plan has been approved.]

"Subcontract," ~~as used in this clause,~~ means any agreement (other than one involving an employer-employee relationship) entered into by a Federal Government prime Contractor or subcontractor calling for supplies or services required for performance of the contract or subcontract.

(c) The offeror, upon request by the Contracting Officer, shall submit and negotiate a subcontracting plan, where applicable, which separately addresses subcontracting with small business concerns, with small disadvantaged business concerns and with women-owned small business concerns. If the offeror is submitting an individual contract plan, the plan must separately address subcontracting with small business concerns, small disadvantaged business concerns, and women-owned small business concerns with a separate part for the basic contract and separate parts for each option (if any). The plan shall be included in and made a part of the resultant contract. The subcontracting plan shall be negotiated within the time specified by the Contracting Officer. Failure to submit and negotiate the subcontracting plan shall make the offeror ineligible for award of a contract.

(d) The offeror's subcontracting plan shall include the following:

(1) Goals, expressed in terms of percentages of total planned subcontracting dollars, for the use of small business concerns, small disadvantaged business concerns and women-owned small business concerns as subcontractors. The offeror shall include all subcontracts that contribute to contract performance, and may include a proportionate share of products and services that are normally allocated as indirect costs.

(2) A statement of--

(i) Total dollars planned to be subcontracted [**for an individual contract plan; or the offeror's total projected sales, expressed in dollars, and the total value of projected subcontracts to support the sales for a commercial plan**];

(ii) Total dollars planned to be subcontracted to small business concerns;

(iii) Total dollars planned to be subcontracted to small disadvantaged business concerns; and

(iv) Total dollars planned to be subcontracted to women-owned small business concerns.

(3) A description of the principal types of supplies and services to be subcontracted, and an identification of the types planned for subcontracting to (i) small business concerns, (ii) small disadvantaged business concerns and (iii) women-owned small business concerns.

(4) A description of the method used to develop the subcontracting goals in paragraph (d)(1) of this clause.

(5) A description of the method used to identify potential sources for solicitation purposes (e.g., existing company source lists, the Procurement Automated Source System (PASS) of the Small Business Administration, the National Minority Purchasing Council Vendor Information Service, the Research and Information Division of the Minority Business Development Agency in the Department of Commerce, or small, small disadvantaged and women-owned small business concerns trade associations). A firm may rely on the information contained in PASS as an accurate representation of a concern's size and ownership characteristics for purposes of maintaining a small business source list. A firm may rely on PASS as its small business source list. Use of the PASS as its source list does not relieve a firm of its responsibilities (e.g., outreach, assistance, counseling, publicizing subcontracting opportunities) in this clause.

(6) A statement as to whether or not the offeror included indirect costs in establishing subcontracting goals, and a description of the method used to determine the proportionate share of indirect costs to be incurred with (i) small business concerns, (ii) small disadvantaged business concerns, and (iii) women-owned small business concerns.

(7) The name of the individual employed by the offeror who will administer the offeror's subcontracting program, and a description of the duties of the individual.

(8) A description of the efforts the offeror will make to assure that small, small disadvantaged and women-owned small business concerns have an equitable opportunity to compete for subcontracts.

(9) Assurances that the offeror will include the clause in this contract entitled "Utilization of Small, Small Disadvantaged And Women-Owned Small Business Concerns" in all subcontracts that offer further subcontracting opportunities, and that the offeror will require all subcontractors (except small business concerns) ~~who~~**[that]** receive subcontracts in excess of \$500,000 (\$1,000,000 for construction of any public facility) to adopt a **[subcontracting]** plan ~~similar to the plan agreed to by the offeror~~ **[that complies with the requirements of this clause]**.

(10) Assurances that the offeror will (i) Cooperate in any studies or surveys as may be required, (ii) Submit periodic reports ~~in order to allow~~ **[so that]** the Government ~~to~~ **[can]** determine the extent of compliance by the offeror with the subcontracting plan, (iii) Submit Standard Form (SF) 294, Subcontracting Report for Individual Contracts, and/or SF 295, Summary Subcontract Report, ~~in accordance with~~ **[following]** the instructions on the forms **[or as provided in agency regulations;]** and (iv) Ensure that its subcontractors agree to submit ~~Standard Forms 294 and 295~~ **[SF's 294 and 295]**.

(11) ~~A recitation~~ **[description]** of the types of records ~~the offeror~~ **[that]** will **[be]** maintain**[ed]** ~~to demonstrate~~ **[concerning]** procedures that have been adopted to comply with the requirements and goals in the plan, including establishing source lists; and a description of **[the offeror's]** ~~its~~ efforts to

locate small, small disadvantaged and women-owned small business concerns and award subcontracts to them. The records shall include at least the following (on a plant-wide or company-wide basis, unless otherwise indicated):

(i) Source lists (e.g., PASS), guides, and other data that identify small, small disadvantaged and women-owned small business concerns.

(ii) Organizations contacted in an attempt to locate sources that are small, small disadvantaged or women-owned small business concerns.

(iii) Records on each subcontract solicitation resulting in an award of more than \$100,000, indicating (A) Whether small business concerns were solicited and if not, why not, (B) Whether small disadvantaged business concerns were solicited and if not, why not, (C) Whether women-owned small business concerns were solicited and if not, why not, and (D) If applicable, the reason award was not made to a small business concern.

(iv) Records of any outreach efforts to contact--(A) trade associations, (B) business development organizations, and (C) conferences and trade fairs to locate small, small disadvantaged and women-owned small business sources.

(v) Records of internal guidance and encouragement provided to buyers through (A) workshops, seminars, training, etc., and (B) monitoring performance to evaluate compliance with the program's requirements.

(vi) On a contract-by-contract basis, records to support award data submitted by the offeror to the Government, including the name, address, and business size of each subcontractor. Contractors having ~~company or division wide annual~~ **[commercial]** plans need not comply with this requirement.

(e) In order to effectively implement this plan to the extent consistent with efficient contract performance, the Contractor shall perform the following functions:

(1) Assist small, small disadvantaged and women-owned small business concerns by arranging solicitations, time for the preparation of bids, quantities, specifications, and delivery schedules so as to facilitate the participation by such concerns. Where the e[C]ontractor's lists of potential small, small disadvantaged and women-owned small business subcontractors are excessively long, reasonable effort shall be made to give all such small business concerns an opportunity to compete over a period of time.

(2) Provide adequate and timely consideration of the potentialities of small, small disadvantaged and women-owned small business concerns in all "make-or-buy" decisions.

(3) Counsel and discuss subcontracting opportunities with representatives of small, small disadvantaged and women-owned small business firms.

(4) Provide notice to subcontractors concerning penalties and remedies for misrepresentations of business status as small, small disadvantaged or women-owned small business for the purpose of obtaining a subcontract that is to be included as part or all of a goal contained in the Contractor's subcontracting plan.

(f) A master ~~subcontracting~~ plan on a plant or division-wide basis ~~which~~[that] contains all the elements required by paragraph (d) of this clause, except goals, may be incorporated by reference as a part of the subcontracting plan required of the offeror by this clause; provided (1) the master plan has been approved, (2) the offeror ensures that the master plan is updated as necessary and provides copies of the approved master plan, including evidence of its approval, to the Contracting Officer, and (3) goals and any deviations from the master plan deemed necessary by the Contracting Officer to satisfy the requirements of this contract are set forth in the individual subcontracting plan.

~~(g)(1) If a commercial product is offered, the subcontracting plan required by this clause may relate to the offeror's production generally, for both commercial and noncommercial products,~~

~~rather than solely to the Government contract. In these cases, the offeror shall, with the concurrence of the Contracting Officer, submit one company wide or division wide annual plan.~~

~~—— (2) The annual plan shall be reviewed for approval by the agency awarding the offeror its first prime contract requiring a subcontracting plan during the fiscal year, or by an agency satisfactory to the Contracting Officer.~~

~~—— (3) The approved plan shall remain in effect during the offeror's fiscal year for all of the offeror's commercial products.~~

[(g) A commercial plan is the preferred type of subcontracting plan for contractors furnishing commercial items. The commercial plan shall relate to the offeror's planned subcontracting generally, for both commercial and Government business, rather than solely to the Government contract. Commercial plans are also preferred for subcontractors that provide commercial items under a prime contract, whether or not the prime contractor is supplying a commercial item.]

(h) Prior compliance of the offeror with other such subcontracting plans under previous contracts will be considered by the Contracting Officer in determining the responsibility of the offeror for award of the contract.

(i) The failure of the Contractor or subcontractor to comply in good faith with (1) the clause of this contract entitled "Utilization of Small, Small Disadvantaged Business and Women-Owned Small Business Concerns," or (2) an approved plan required by this clause, shall be a material breach of the contract.

(End of clause)

Alternate I (OCT 1995). When contracting by sealed bidding rather than by negotiation, substitute the following paragraph (c) for paragraph (c) of the basic clause:

(c) The apparent low bidder, upon request by the Contracting Officer, shall submit a subcontracting plan, where applicable, which separately addresses subcontracting with small business concerns, with small disadvantaged business concerns and with women-owned small business concerns. If the bidder is submitting an individual contract plan, the plan must separately address subcontracting with small business concerns, small disadvantaged business concerns and women-owned small business concerns, with a separate part for the basic contract and separate parts for each option (if any). The plan shall be included in and made a part of the resultant contract. The subcontracting plan shall be submitted within the time specified by the Contracting Officer. Failure to submit the subcontracting plan shall make the bidder ineligible for the award of a contract.

Alternate II (MAR 1996). As prescribed in 19.708(b)(1), substitute the following paragraph (c) for paragraph (c) of the basic clause:

(c) Proposals submitted in response to this solicitation shall include a subcontracting plan, which separately addresses subcontracting with small business concerns, small disadvantaged business concerns and women-owned small business concerns. If the offeror is submitting an individual contract plan, the plan must separately address subcontracting with small business concerns, small disadvantaged business concerns and women-owned small business concerns with a separate part for the basic contract and separate parts for each option (if any). The plan shall be included in and made a part of the resultant contract. The subcontracting plan shall be negotiated within the time specified by the Contracting Officer. Failure to submit and negotiate a subcontracting plan shall make the offeror ineligible for award of a contract.

* * * * *

52.219-16 Liquidated Damages--Subcontracting Plan.

As prescribed in 19.708(b)(2), insert the following clause:

LIQUIDATED DAMAGES--SUBCONTRACTING PLAN (OCT 1995)

(a) "Failure to make a good faith effort to comply with the subcontracting plan," as used in this clause, means a willful or intentional failure to perform in accordance with the requirements of the subcontracting plan approved under the clause in this contract entitled "Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan," or willful or intentional action to frustrate the plan.

(b) **[Performance shall be measured by applying the percentage goals to the total actual subcontracting dollars or, if a commercial plan is involved, to the pro rata share of actual subcontracting dollars attributable to Government contracts covered by the commercial plan.]** If, at contract completion, or in the case of a commercial ~~product~~ plan, at the close of the fiscal year for which the plan is applicable, the Contractor has failed to meet its subcontracting goals and the Contracting Officer decides in accordance with paragraph (c) of this clause that the Contractor failed to make a good faith effort to comply with its subcontracting plan, established in accordance with the clause in this contract entitled "Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan," the Contractor shall pay the Government liquidated damages in an amount stated. The amount of probable damages attributable to the Contractor's failure to comply, shall be an amount equal to the actual dollar amount by which the Contractor failed to achieve each subcontract goal[.] ~~or,~~
~~in the case of a commercial products plan, that portion of the dollar amount allocable to Government contracts by which the Contractor failed to achieve each subcontract goal.~~

(c) Before the Contracting Officer makes a final decision that the Contractor has failed to make such good faith effort, the Contracting Officer shall give the Contractor written notice specifying the failure and permitting the Contractor to demonstrate what good faith efforts have been made **[and to discuss the matter]**. Failure to respond to the notice may be taken as an admission that no valid explanation

exists. If, after consideration of all the pertinent data, the Contracting Officer finds that the Contractor failed to make a good faith effort to comply with the subcontracting plan, the Contracting Officer shall issue a final decision to that effect and require that the Contractor pay the Government liquidated damages as provided in paragraph (b) of this clause.

(d) With respect to commercial ~~product~~ plans ; ~~i.e., company-wide or division-wide subcontracting plans approved under paragraph (g) of the clause in this contract entitled, "Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan", the Contracting Officer of the agency that originally approved the plan will exercise the functions of the Contracting Officer under this clause on behalf of all agencies that awarded contracts covered by that commercial product plan.~~ [, the Contracting Officer who approved the plan will perform the functions of the Contracting Officer under this clause on behalf of all agencies with contracts covered by the commercial plan].

(e) The Contractor shall have the right of appeal, under the clause in this contract entitled, Disputes, from any final decision of the Contracting Officer.

(f) Liquidated damages shall be in addition to any other remedies that the Government may have.

(End of clause)

SUBCONTRACTING REPORT FOR INDIVIDUAL CONTRACTS
(See instructions on reverse)

OMB No.: 9000-0006
Expires: 03/31/98

Public reporting burden for this collection of information is estimated to average 3 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the FAR Secretariat (MVR), Federal Acquisition Policy Division, GSA, Washington, DC 20405.

1. CORPORATION, COMPANY OR SUBDIVISION COVERED			3. DATE SUBMITTED	
a. COMPANY NAME			4. REPORTING PERIOD FROM INCEPTION OF CONTRACT THRU: <input type="checkbox"/> MAR 31 <input type="checkbox"/> SEPT 30 YEAR	
b. STREET ADDRESS				
c. CITY	d. STATE	e. ZIP CODE		
2. CONTRACTOR IDENTIFICATION NUMBER			5. TYPE OF REPORT <input type="checkbox"/> REGULAR <input type="checkbox"/> FINAL <input type="checkbox"/> REVISED	

6. ADMINISTERING ACTIVITY *(Please check applicable box)*

<input type="checkbox"/> ARMY	<input type="checkbox"/> GSA	<input type="checkbox"/> NASA
<input type="checkbox"/> NAVY	<input type="checkbox"/> DOE	<input type="checkbox"/> OTHER FEDERAL AGENCY <i>(Specify)</i>
<input type="checkbox"/> AIR FORCE	<input type="checkbox"/> DEFENSE LOGISTICS AGENCY	

7. REPORT SUBMITTED AS <i>(Check one and provide appropriate number)</i>		8. AGENCY OR CONTRACTOR AWARDED CONTRACT	
<input type="checkbox"/> PRIME CONTRACTOR	PRIME CONTRACT NUMBER	a. AGENCY'S OR CONTRACTOR'S NAME	
	SUBCONTRACT NUMBER	b. STREET ADDRESS	
<input type="checkbox"/> SUBCONTRACTOR			
9. DOLLARS AND PERCENTAGES IN THE FOLLOWING BLOCKS: <input type="checkbox"/> DO INCLUDE INDIRECT COSTS <input type="checkbox"/> DO NOT INCLUDE INDIRECT COSTS		c. CITY	d. STATE e. ZIP CODE

SUBCONTRACT AWARDS

TYPE	CURRENT GOAL		ACTUAL CUMULATIVE	
	WHOLE DOLLARS	PERCENT	WHOLE DOLLARS	PERCENT
10a. SMALL BUSINESS CONCERNS <i>(Include SDB, WOSB, HBCU/MI) (Dollar Amount and Percent of 10c.)</i>				
10b. LARGE BUSINESS CONCERNS <i>(Dollar Amount and Percent of 10c.)</i>				
10c. TOTAL <i>(Sum of 10a and 10b.)</i>		100.0%		100.0%
11. SMALL DISADVANTAGED (SDB) CONCERNS <i>(Include HBCU/MI) (Dollar Amount and Percent of 10c.)</i>				
12. WOMEN-OWNED SMALL BUSINESS (WOSB) CONCERNS <i>(Dollar Amount and Percent of 10c.)</i>				
13. REMARKS				

14a. NAME OF INDIVIDUAL ADMINISTERING SUBCONTRACTING PLAN	14b. TELEPHONE NUMBER	
	AREA CODE	NUMBER

GENERAL INSTRUCTIONS

1. This report is not required from small businesses.
2. This report is not required for commercial items for which a company-wide annual plan (i.e., a Commercial Plan) has been approved, nor from large businesses in the Department of Defense (DOD) Test Program for Negotiation of Comprehensive Subcontracting Plans. The Summary Subcontract Report (SF 295) is required for contractors operating under one of these two conditions and should be submitted to the Government in accordance with the instructions on that form.
3. This form collects subcontract award data from prime contractors/subcontractors that: (a) hold one or more contracts over \$500,000 (over \$1,000,000 for construction of a public facility); and (b) are required to report subcontracts awarded to Small Business (SB), Small Disadvantaged Business (SDB), and Women-Owned Small Business (WOSB) concerns under a subcontracting plan. For the Department of Defense (DOD), the National Aeronautics and Space Administration (NASA), and the Coast Guard, this form also collects subcontract award data for Historically Black Colleges and Universities (HBCUs) and Minority Institutions (MIs).
4. This report is required for each contract containing a subcontracting plan and must be submitted to the administrative contracting officer (ACO) or contracting officer if no ACO is assigned, semi-annually during contract performance for the periods ended March 31st and September 30th. A separate report is required for each contract at contract completion. Reports are due 30 days after the close of each reporting period unless otherwise directed by the contracting officer. Reports are required when due, regardless of whether there has been any subcontracting activity since the inception of the contract or since the previous report.
5. Only subcontracts involving performance within the U.S., its possessions, Puerto Rico, and the Trust Territory of the Pacific Islands should be included in this report.
6. Purchases from a corporation, company, or subdivision that is an affiliate of the prime/subcontractor are not included in this report.
7. Subcontract award data reported on this form by prime contractors/subcontractors shall be limited to awards made to their immediate subcontractors. Credit cannot be taken for awards made to lower tier subcontractors.

SPECIFIC INSTRUCTIONS

BLOCK 2: For the Contractor Identification Number, enter the nine-digit Data Universal Numbering System (DUNS) number that identifies the specific contractor establishment. If there is no DUNS number available that identifies the exact name and address entered in Block 1, contact Dun and Bradstreet Information Services at 1-800-333-0505 to get one free of charge over the telephone. Be prepared to provide the following information: (1) Company name; (2) Company address; (3) Company telephone number; (4) Line of business; (5) Chief executive officer/key manager; (6) Date the company was started; (7) Number of people employed by the company; and (8) Company affiliation.

BLOCK 4: Check only one. Note that all subcontract award data reported on this form represents activity since the inception of the contract through the date indicated in this block.

BLOCK 5: Check whether this report is a "Regular," "Final," and/or "Revised" report. A "Final" report should be checked only if the contractor has completed the contract or subcontract reported in Block 7. A "Revised" report is a change to a report previously submitted for the same period.

BLOCK 6: Identify the department or agency administering the majority of subcontracting plans.

BLOCK 7: Indicate whether the reporting contractor is submitting this report as a prime contractor or subcontractor and the prime contract or subcontract number.

BLOCK 8: Enter the name and address of the Federal department or agency awarding the contract or the prime contractor awarding the subcontract.

BLOCK 9: Check the appropriate block to indicate whether indirect costs are included in the dollar amounts in blocks 10a through 12. To ensure comparability between the goal and actual columns, the contractor may include indirect costs in the actual column only if the subcontracting plan included indirect costs in the goal.

BLOCKS 10a through 12: Under "Current Goal," enter the dollar and percent goals in each category (SB, SDB, and WOSB) from the sub-

contracting plan approved for this contract. (If the original goals agreed upon at contract award have been revised as a result of contract modifications, enter the original goals in Block 13. The amounts entered in Blocks 10a through 12 should reflect the revised goals.) Under "Actual Cumulative," enter actual subcontract achievements (dollar and percent) from the inception of the contract through the date of the report shown in Block 4. In cases where indirect costs are included, the amounts should include both direct awards and an appropriate prorated portion of indirect awards.

BLOCK 10a: Report all subcontracts awarded to SBs including subcontracts to SDBs and WOSBs. For DOD, NASA, and Coast Guard contracts, include subcontracting awards to HBCUs and MIs.

BLOCK 10b: Report all subcontracts awarded to large businesses (LBs).

BLOCK 10c: Report on this line the total of all subcontracts awarded under this contract (the sum of lines 10a and 10b).

BLOCKS 11 and 12: Each of these items is a subcategory of Block 10a. Note that in some cases the same dollars may be reported in both Block 11 and Block 12 (i.e., SDBs owned by women).

BLOCK 11: Report all subcontracts awarded to SDBs (including women-owned SDBs). For DOD, NASA, and Coast Guard contracts, include subcontract awards to HBCUs and MIs.

BLOCK 12: Report all subcontracts awarded to Women-Owned firms (including SDBs owned by women).

BLOCK 13: Enter a short narrative explanation if (a) SB, SDB, or WOSB accomplishments fall below that which would be expected using a straight-line projection of goals through the period of contract performance; or (b) if this is a final report, any one of the three goals was not met.

SPECIAL INSTRUCTIONS FOR COMMERCIAL PLANS

DEFINITIONS

1. Commercial item means a product or service that satisfies the definition of commercial item in Section 2.101 of the Federal Acquisition Regulation. *including goals*
2. Commercial plan means a subcontracting plan that covers the offeror's fiscal year and that applies to the entire production of commercial items sold by either the entire company or a portion thereof (e.g., division, plant, or product line).
3. Subcontract means a contract, purchase order, amendment, or other legal obligation executed by the prime contractor/subcontractor calling for supplies or services required for the performance of the original contract or subcontract.

4. Direct Subcontract Awards are those that are identified with the performance of one or more specific Government contract(s).

5. Indirect costs are those which, because of incurrence for common or joint purposes, are not identified with specific Government contracts; these awards are related to Government contract performance but remain for allocation after direct awards have been determined and identified to specific Government contracts.

DISTRIBUTION OF THIS REPORT

For the Awarding Agency or Contractor:

The original copy of this report should be provided to the contracting officer at the agency or contractor identified in Block 8. For contracts with DOD, a copy should also be provided to the Defense Logistics Agency (DLA) at the cognizant Defense Contract Management Area Operations (DCMAO) office.

For the Small Business Administration (SBA):

A copy of this report must be provided to the cognizant Commercial Market Representative (CMR) at the time of a compliance review. It is NOT necessary to mail the SF 294 to SBA unless specifically requested by the CMR.

SUMMARY SUBCONTRACT REPORT
(See instructions on reverse)

OMB No.: 9000-0007
Expires: 03/31/98

Public reporting burden for this collection of information is estimated to average 13 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the FAR Secretariat (MVR), Federal Acquisition Policy Division, GSA, Washington, DC 20405.

1. CORPORATION, COMPANY OR SUBDIVISION COVERED			3. DATE SUBMITTED				
a. COMPANY NAME			4. REPORTING PERIOD: <table border="1" style="width:100%"><tr><td><input type="checkbox"/> OCT 1 - MAR 31</td><td><input type="checkbox"/> OCT 1 - SEPT 30</td><td>YEAR</td></tr></table>		<input type="checkbox"/> OCT 1 - MAR 31	<input type="checkbox"/> OCT 1 - SEPT 30	YEAR
<input type="checkbox"/> OCT 1 - MAR 31	<input type="checkbox"/> OCT 1 - SEPT 30	YEAR					
b. STREET ADDRESS							
c. CITY	d. STATE	e. ZIP CODE	5. TYPE OF REPORT <input type="checkbox"/> REGULAR <input type="checkbox"/> FINAL <input type="checkbox"/> REVISED				
2. CONTRACTOR IDENTIFICATION NUMBER							

6. ADMINISTERING ACTIVITY *(Please check applicable box)*

<input type="checkbox"/> ARMY	<input type="checkbox"/> DEFENSE LOGISTICS AGENCY	<input type="checkbox"/> DOE
<input type="checkbox"/> NAVY	<input type="checkbox"/> NASA	<input type="checkbox"/> OTHER FEDERAL AGENCY <i>(Specify)</i>
<input type="checkbox"/> AIR FORCE	<input type="checkbox"/> GSA	

7. REPORT SUBMITTED AS <i>(Check one)</i>		8. TYPE OF PLAN	
<input type="checkbox"/> PRIME CONTRACTOR	<input type="checkbox"/> BOTH	<input type="checkbox"/> INDIVIDUAL	<input type="checkbox"/> COMMERCIAL
<input type="checkbox"/> SUBCONTRACTOR		IF PLAN IS A COMMERCIAL PLAN, SPECIFY THE PERCENTAGE OF THE DOLLARS ON THIS REPORT ATTRIBUTABLE TO THIS AGENCY.	

9. CONTRACTOR'S MAJOR PRODUCTS OR SERVICE LINES

a		c	
b		d	

CUMULATIVE FISCAL YEAR SUBCONTRACT AWARDS
(Report cumulative figures for reporting period in Block 4)

TYPE	WHOLE DOLLARS	PERCENT (To nearest tenth of a %)
10a. SMALL BUSINESS CONCERNS <i>(Include SDB, WOSB, HBCU/MI)</i> <i>(Dollar Amount and Percent of 10c.)</i>		
10b. LARGE BUSINESS CONCERNS <i>(Dollar Amount and Percent of 10c.)</i>		
10c. TOTAL <i>(Sum of 10a and 10b.)</i>		
11. SMALL DISADVANTAGED (SDB) CONCERNS <i>(Dollar Amount and Percent of 10c.)</i>		
12. WOMEN-OWNED SMALL BUSINESS (WOSB) CONCERNS <i>(Dollar Amount and Percent of 10c.)</i>		
13. HISTORICALLY BLACK COLLEGES AND UNIVERSITIES (HBCU) AND MINORITY INSTITUTIONS (MI) <i>(If applicable) (Dollar Amount and Percent of 10c.)</i>		
14. REMARKS		

15. CONTRACTOR'S OFFICIAL WHO ADMINISTERS SUBCONTRACTING PROGRAM

a. NAME	b. TITLE	c. TELEPHONE NUMBER	
		AREA CODE	NUMBER

16. CHIEF EXECUTIVE OFFICER

a. NAME	c. SIGNATURE
b. TITLE	d. DATE

GENERAL INSTRUCTIONS

1. This report is not required from small businesses.
2. This form collects subcontract award data from prime contractors/subcontractors that: (a) hold one or more contracts over \$500,000 (over \$1,000,000 for construction of a public facility); and (b) are required to report subcontracts awarded to Small Business (SB), Small Disadvantaged Business (SDB), and Women-Owned Small Business (WOSB) concerns under a subcontracting plan. For the Department of Defense (DOD), the National Aeronautics and Space Administration (NASA), and the Coast Guard, this form also collects subcontract award data for Historically Black Colleges and Universities (HBCUs) and Minority Institutions (MIs).
3. This report must be submitted semi-annually (for the six months ended March 31st and the twelve months ended September 30th) for contracts with the Department of Defense (DOD) and annually (for the twelve months ended September 30th) for contracts with civilian agencies, except for contracts covered by an approved Commercial Plan (see special instructions in right-hand column). Reports are due 30 days after the close of each reporting period.
4. This report may be submitted on a corporate, company, or subdivision (e.g., plant or division operating on a separate profit center) basis, unless otherwise directed by the agency awarding the contract.
5. If a prime contractor/subcontractor is performing work for more than one Federal agency, a separate report shall be submitted to each agency covering only that agency's contracts, provided at least one of that agency's contracts is over \$500,000 (over \$1,000,000 for construction of a public facility) and contains a subcontracting plan. (Note that DOD is considered to be a single agency; see next instruction.)
6. For DOD, a consolidated report should be submitted for all contracts awarded by military departments/agencies and/or subcontracts awarded by DOD prime contractors. However, DOD contractors involved in construction and related maintenance and repair must submit a separate report for each DOD component.
7. Only subcontracts involving performance within the U.S., its possessions, Puerto Rico, and the Trust Territory of the Pacific Islands should be included in this report.
8. Purchases from a corporation, company, or subdivision that is an affiliate of the prime/subcontractor are not included in this report.
9. Subcontract award data reported on this form by prime contractors/subcontractors shall be limited to awards made to their immediate subcontractors. Credit cannot be taken for awards made to lower tier subcontractors.
10. See special instructions in right-hand column for Commercial Plans.

SPECIFIC INSTRUCTIONS

BLOCK 2: For the Contractor Identification Number, enter the nine-digit Data Universal Numbering System (DUNS) number that identifies the specific contractor establishment. If there is no DUNS number available that identifies the exact name and address entered in Block 1, contact Dun and Bradstreet Information Services at 1-800-333-0505 to get one free of charge over the telephone. Be prepared to provide the following information: (1) Company name; (2) Company address; (3) Company telephone number; (4) Line of business; (5) Chief executive officer/key manager; (6) Date the company was started; (7) Number of people employed by the company; and (8) Company affiliation.

BLOCK 4: Check only one. Note that March 31 represents the six months from October 1st and that September 30th represents the twelve months from October 1st. Enter the year of the reporting period.

BLOCK 5: Check whether this report is a "Regular," "Final," and/or "Revised" report. A "Final" report should be checked only if the contractor has completed all the contracts containing subcontracting plans awarded by the agency to which it is reporting. A "Revised" report is a change to a report previously submitted for the same period.

BLOCK 6: Identify the department or agency administering the majority of subcontracting plans.

BLOCK 7: This report encompasses all contracts with the Federal Government for the agency to which it is submitted, including subcontracts received from other large businesses that have contracts with the same agency. Indicate in this block whether the contractor is a prime contractor, subcontractor, or both (check only one).

BLOCK 8: Check only one. Check "Commercial Plan" only if this report is under an approved Commercial Plan. For a Commercial Plan, the contractor must specify the percentage of dollars in Blocks 10a through 13 attributable to the agency to which this report is being submitted.

BLOCK 9: Identify the major product or service lines of the reporting organization.

BLOCKS 10a through 13: These entries should include all subcontract awards resulting from contracts or subcontracts, regardless of dollar amount, received from the agency to which this report is submitted. If reporting as a subcontractor, report all subcontracts awarded under prime contracts. Amounts should include both direct awards and an appropriate prorated portion of indirect awards. (The indirect portion is based on the percentage of work being performed for the organization to which the report is being submitted in relation to other work being performed by the prime contractor/subcontractor.) Do not include awards made in support of commercial business unless "Commercial" is checked in Block 8 (see Special Instructions for Commercial Plans in right hand column).

Report only those dollars subcontracted this fiscal year for the period indicated in Block 4.

BLOCK 10a: Report all subcontracts awarded to SBs including subcontracts to SDBs and WOSBs. For DOD, NASA, and Coast Guard contracts, include subcontracting awards to HBCUs and MIs.

BLOCK 10b: Report all subcontracts awarded to large businesses (LBs).

BLOCK 10c: Report on this line the grand total of all subcontracts (the sum of lines 10a and 10b).

BLOCKS 11 and 13: Each of these items is a subcategory of Block 10a. Note that in some cases the same dollars may be reported on both Block 11 and Block 12 (i.e., SDBs owned by women); likewise subcontracts to HBCUs or MIs should be reported on both Block 11 and 13.

BLOCK 11: Report all subcontracts awarded to SDBs (including women-owned SDBs). For DOD, NASA, and Coast Guard contracts, include subcontract awards to HBCUs and MIs.

BLOCK 12: Report all subcontracts awarded to Women-Owned Small Business firms (including SDBs owned by women).

BLOCK 13 (For contracts with DOD, NASA, and Coast Guard): Enter the dollar value of all subcontracts with HBCUs/MIs.

[BLOCK 14 list all contract numbers to which the Commercial Plan applies.]
SPECIAL INSTRUCTIONS FOR COMMERCIAL PLANS

1. This report is due on October 30th each year for the previous fiscal year ended September 30th.

2. The annual report submitted by reporting organizations that have an approved company-wide annual subcontracting plan for commercial items shall include all subcontracting activity under commercial plans in effect during the year and shall be submitted in addition to the required reports for other-than-commercial items, if any.

3. Enter in Blocks 10a through 13 the total of all subcontract awards under the contractor's Commercial Plan. Show in Block 8 the percentage of this total that is attributable to the agency to which this report is being submitted. This report must be submitted to each agency from which contracts for commercial products covered by an approved Commercial Plan were received.

DEFINITIONS

1. Commercial item means a product or service that satisfies the definition of commercial item in Section 2.101 of the Federal Acquisition Regulation.

2. Commercial plan means a subcontracting plan that covers the offeror's fiscal year and that applies to the entire production of commercial items sold by either the entire company or a portion thereof (e.g., division, plant, or product line).

3. Subcontract means a contract, purchase order, amendment, or other legal obligation executed by the prime contractor/subcontractor calling for supplies or services required for the performance of the original contract or subcontract.

4. Direct Subcontract Awards are those that are identified with the performance of one or more specific Government contract(s).

5. Indirect Subcontract Awards are those which, because of incurrence for common or joint purposes, are not identified with specific Government contracts; these awards are related to Government contract performance but remain for allocation after direct awards have been determined and identified to specific Government contracts.

SUBMITTAL ADDRESSES FOR ORIGINAL REPORT

For DOD Contractors, send reports to the cognizant contract administration office as stated in the contract.

For Civilian Agency Contractors, send reports to awarding agency:

1. NASA: Forward reports to NASA, Office of Procurement (HQS), [HQS] Washington, DC 20546
2. OTHER FEDERAL DEPARTMENTS OR AGENCIES: Forward report to the OSDBU Director unless otherwise provided for in instructions by the Department or Agency.

FOR ALL CONTRACTORS:

SMALL BUSINESS ADMINISTRATION (SBA): Send "info copy" to the cognizant Commercial Market Representative (CMR) at the address provided by SBA. Call SBA Headquarters in Washington, DC at (202) 205-6475 for correct address if unknown.

Liquidated Damages (FAR Case 97-300)
RECOMMENDED CHANGES

1) At 19.705-4(d)(3), we have amended the language to conform with the FAR guidance in obtaining cost or pricing data and information other than cost or pricing data at 15.804.

2) At 19.705-4(d)(5), we concur with the minority opinion to list a contracting officer's consideration of the "potential contractor's long-standing contractual relationship with its supplier" in reviewing a subcontracting plan. We agree that the elimination of the phrase might suggest that long-standing contractual relationships should no longer be considered in evaluating a subcontracting plan.

3) At 19.705-7(f)(2) and (3), we ask the contracting officer, assessing liquidated damages, to obtain information from all other contracting officers with contracts subject to the commercial plan and also provide them with a copy of the results of his review. However, we have no written direction to the contractor to list contracts to which the commercial plan applies. Without this list, the contracting officer is unable to contact the other contracting officers under the plan. To remedy this situation, we have added new directions for Block 14 on the back of the SF 295. The directions require the contractor to list all contracts to which the commercial plan applies. These contract numbers will provide the initial contracting officer with information related to the activity addresses of the other contracting officers.

4) At 19.705-7(f)(3), we have deleted the fourth sentence for clarity. The sentence does not appear to add any value to the example given for calculating and assessing liquidated damages on the Government's behalf.

5) At 52.219-9(b) and on the back of SF 294 and SF 295, we have added the same change that the SB Committee has made to 19.701 with respect to including the parenthetical "(including goals)" to the definition of commercial plans.

6) At 52.219-9(g), we have added language to explicitly state (as in the OFPP Policy letter at 5(2)(b)) that commercial item plans are also preferred for subcontractors that provide commercial items under a prime contract, whether or not the prime contractor is supplying a commercial item.

ATCH 2

(Billing Code 6820-34-P)

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 11, 19, 52, and 53

[FAR Case 97-300]

**Federal Acquisition Regulation;
Liquidated Damages**

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final Rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to clarify policy on liquidated damages and commercial subcontracting plans and to implement OFPP Policy Letter 95-1, Subcontracting Plans for Companies Supplying Commercial Items. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993. This is not a major rule under 5 U.S.C. 804.

SUPPLEMENTARY INFORMATION:

ACH 3

A. BACKGROUND

An interim rule, under FAR Case 89-042 (Liquidated Damages), was published on July 21, 1989 (54 FR 30708), to require a prime contractor to pay liquidated damages upon a finding of a lack of good faith effort to meet small business subcontracting goals. This rule implemented Section 304 of the Business Opportunity Development Reform Act of 1988, Pub. L. 100-656.

A proposed rule containing revisions to the interim rule was published on April 11, 1997 (62 FR 17960). The revisions in the proposed rule resulted from the public comments received on the interim rule, and from the requirements of OFPP Policy Letter 95-1, Subcontracting Plans for Companies Supplying Commercial Items.

Eight sources submitted comments in response to the proposed rule. All comments were considered in developing the final rule.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because small business concerns are exempt from subcontracting plan requirements.

C. Paperwork Reduction Act

The Paperwork Reduction Act (Public Law 104-13) is deemed to apply because the final rule contains information collection requirements. Therefore, a revised burden estimate for Clearance 9000-0007 was submitted to the Office of Management and Budget and was approved through _____.

List of Subjects in 48 CFR Parts 11, 19, 52, and 53

Government procurement.

FAC INRO ITEM

Item XX--This final rule amends FAR Parts 11, 19, 52, and 53 to clarify policy on liquidated damages and commercial subcontracting plans pertaining to requirements for subcontracting with small business, small disadvantaged business, and women-owned small business concerns. The rule implements Section 304 of the Business Opportunity Development Reform Act of 1988 (Pub. L. 100-656) and OFPP Policy Letter 95-1, Subcontracting Plans for Companies Supplying Commercial Items.

ATCH 4

MATRIX

Respondents	Comments	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
1. NASA	X	X	X	X	X	X										
2. HCFA/BPO					X											
3. CRANE-ELDEC								X	X	X	X	X				
4. EPA	X								X				X	X	X	
5. EDS	X															
6. DOE						X										
7. CODSIA	X			X											X	
8. DOI											X					

Attachment B

Respondents	Comments	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31
1. NASA																	
2. HCFA/BPO																	
3. CRANE-ELDEC																	
4. EPA	X	X															
5. EDS			X	X	X	X											
6. DOE							X	X	X								
7. CODSIA																	
8. DOI														X	X	X	X

DISCUSSION/DISPOSITION OF PUBLIC COMMENTS (FAR Case 97-300)

COMMENT NUMBER 1

A. Summary of Comment: While this case addresses Commercial Subcontracting Plans, the commentors request clarification of applicability, requirements and goals between commercial plans, master plans and individual plans.

B. Respondents: Four (1, 4, 5 and 7)

C. Disposition: Concur in part. FAR 19.704 discusses subcontracting plan options available to a offeror/bidder and the applicability of each type of plan. The proposed coverage at 19.701 *Definitions* of a commercial plan is silent as to whether this type of plan includes goals. We therefore concur to include the parenthetical "including goals" to the definition of commercial plans. This revision is included at TAB A.

COMMENT NUMBER 2

A. Summary of Comment: The commentors express concern that the contracting officer's review of a subcontracting plan does not include consideration of the "potential contractor's long-standing contractual relationship with its suppliers" yet consideration of other factors is included in the proposed revision at 19.705.

B. Respondents: Three (1, 6 and 7)

C. Disposition: Do not concur. While the proposed 19.705-4(d) includes several areas of consideration by the contracting officer in determining acceptability of an offeror's subcontracting plan, the existing and proposed areas are not all inclusive. Areas of consideration are dependent upon the proposed contractual effort to be acquired, the nature of products or services to be subcontracted with small, small disadvantaged and women-owned small business concerns and whether the subcontracted efforts are fair and equitable opportunities to small business concerns.

COMMENT NUMBER 3

A. Summary of Comment: The commentor expressed concern that more explicit instructions are needed regarding the flowdown of subcontracting plan requirements of FAR clause 52.219-9 major subcontractors supplying commercial items.

B. Respondents: Two (1 and 7)

C. Disposition: Concur. See revised coverage at 52.219-9(9), TAB A.

COMMENT NUMBER 4

A. Summary of Comment: Commentor suggests the Instructions for completion of the Summary Subcontract Report, Standard Form 295 (SF 295) include instructions for block 14 entitled *Remarks*. Commentor indicated the Instructions should address including the contracts subject to commercial plans as required by revised 19.705-7(f)(2). This suggestion is made to facilitate contracting officers who approve commercial plans in providing certain documentation to other contracting officers with contracts subject to commercial plans. Second commentor suggested including the Instructions for the *Remarks* block 13 of the SF 294, Subcontracting Report for Individual Contracts, for the SF 295 *Remarks* block instructions.

B. Respondents: Two (1 and 2)

C. Disposition: Do not concur. Listing of contracts subject to commercial plans is only one of many areas that may require addressing in the Remarks section of the SF 295. The SF 294 Block 13 Instructions require a narrative explanation when accomplishments fall below goals. These instructions are inappropriate for the Summary Subcontract Report.

COMMENT NUMBER 5

A. Summary of Comment: The first commentor indicates the sample computation demonstrating the assessment of liquidated damages at proposed 19.705-7(f)(3) appears to be incomplete and therefore incorrect while the second commentor indicates the proposed revised clause 52.219-9 Liquidated Damages--Subcontracting Plan is incomplete. The sample computation is calculated on the pro rata share of subcontract dollars but should be calculated on the dollar amount by which the contractor failed to achieve each subcontracting goal. The sample computation references only to the small business goal and seems to overlook the other subcontracting plan goals.

B. Respondents: Two (1 and 6)

C. Disposition: Concur in part. While the sample could be more comprehensive, it is not incorrect. The commentor is reminded that it is merely an example of how the calculation of liquidated damages is performed. However, to make the example more clear, a revision to the example at 19.705-7(f)(3) is included at TAB A.

COMMENT NUMBER 6

A. Summary of Comment: The commentor from NASA requests the submittal instructions on the reverse of the SF 295, Summary Subcontract Report, be revised to reflect the correct address.

B. Respondents: One (1)

C. Disposition: Concur. The SF 295 submittal address for NASA is changed to reflect the correct Office of Procurement (HS). Since this is a one letter change to the form, recommend the change to the form be held until other changes are warranted. See TAB A.

COMMENT NUMBER 7

A. Summary of Comment: Commentor expresses concern that even though a commercial plan is appropriate for the company's commercial items, because of the reporting requirements of the SF 294, Subcontracting Report for Individual Contracts, companies will still be required to identify specific goals for individual contracts.

B. Respondent: One (3)

C. Disposition: Do not concur. Only one plan and one set of goals is negotiated for a commercial plan and a pro rata share of these goals is assigned to each contract requiring the SF 294 reporting. An SF 294 is not required for commercial plans. Clarification of 52.219-9 is provided by separate case.

COMMENT NUMBER 8

A. Summary of Comment: Commentor indicates with the addition of new requirements in the proposed rule, re-write of subcontracting plans will be required increasing industry's paperwork and cost and should not be linked to the Paperwork Reduction Act. Commentor further suggests that if specific contract reporting is eliminated, paperwork would be significantly reduced under the Paperwork Reduction Act.

B. Respondents: One (3)

C. Disposition: Do not concur. The proposed rule, as published in the *Federal Register*, indicates the Paperwork Reduction Act applies. Elimination of separate contract reporting is outside the scope of this case. However, nothing in this rule adds any new requirements to subcontracting plans. A request for approval of a revised burden estimate was submitted to the Office of Management and Budget and approved.

COMMENT NUMBER 9

A. Summary of Comment: Commentor indicates industry needs flexibility to establish subcontracting goals that are challenging yet achievable and not have Government dictate goals.

B. Respondent: One (3)

C. Disposition: Concur. Although the five (5) percent small disadvantaged business subcontracting goals and the five (5) percent women-owned small business subcontracting goals are legislated, they are goals. As detailed in FAR 19.705-4, the contracting officer considers several factors in determining acceptability of a proposed subcontracting plan including its goals. Factors considered include whether the offeror's plan includes the essential elements at FAR 19.704, past performance in making a good faith effort to award subcontracts to small, small disadvantaged and women-owned small business concerns to the maximum extent practicable and the offeror's make-or-buy policy or program. No change to the proposed rule is necessary.

COMMENT NUMBER 10

A. Summary of Comment: Commentor recommends including a list of examples that evidence when “good faith efforts” have been made by a contractor to reach its subcontracting goals since the proposed rule includes examples of a failure to make a “good faith effort.” The recommendation is made to reduce the subjectivity of the analysis conducted in determining whether to assess liquidated damages for the contractor’s failure to make a good faith effort to achieve its subcontracting plan.

B. Respondents: Two (3 and 8)

C. Disposition: Do not concur. The proposed rule, at FAR 19.705-7(d), establishes indicators that the contracting officer may use to determine when “good faith effort” has **not** been made by the contractor to comply with its subcontracting plan and has failed to meet its subcontracting goals. When a contractor fails to meet its subcontracting goals at completion of the contract, or any option, or in the case of a commercial plan, at the close of the fiscal year for which the plan is applicable, the contracting officer reviews all available information to determine whether the contractor made a good faith effort to comply with its subcontracting plan and achieve the goals. A contractor that makes a good faith effort to comply with its plan, that includes all of the areas described at FAR 19.704 Subcontract Plan Requirements, may be unsuccessful in achieving its goals but would not be subject to liquidated damages. It is when the contractor takes action, or inaction, to frustrate the plan resulting in failure to achieve the subcontracting goals that the contracting officer considers assessment of liquidated damages. No change to the proposed rule is needed.

COMMENT NUMBER 11

A. Summary of Comment: The commentor questions the purpose of the proposed rule since the changes are not expected to increase or decrease small business awards.

B. Respondent: One (3)

C. Disposition: Comment is noted.

COMMENT NUMBER 12

A. Summary of Comment: Commentor indicates Far 19.701 *Definitions* does not include a designation of the approving official for master plans.

B. Respondent: One (4)

C. Disposition: Comment is noted. The contracting officer is the approval authority for master plans as cited in existing FAR 19.704(b), second sentence. No change is required.

COMMENT NUMBER 13

A. Summary of Comment: Commentor suggests adding language stipulating who has authority to

request the "periodic reports" referred to at FAR 19.704(a)(10)(ii). Commentor suggests "any contracting officer" be designated as having such authority.

B. Respondent: One (4)

C. Disposition: Do not concur. There are many officials in addition to the contracting officer who may request the periodic reports cited above. These officials may include representatives from Offices of Small and Disadvantaged Business Utilization, Office of Federal Procurement Policy and the Small Business Administration. No change to the proposed rule is needed.

COMMENT NUMBER 14

A. Summary of Comment: Commentors describe the circumstances available to the contractor for submission of a commercial plan and to whom and when the commercial plan must be submitted. The first commentor indicates when the commercial plan is to be submitted to the contracting officer responsible for the contract with the "latest completion date," this date needs to be defined. Also, when a new commercial plan is to be submitted 30 days before the end of fiscal year, commentor recommends clarifying whether the 30 day requirement is "calendar days" or "working days." Both commentors recommend that responsibility for negotiation, approval and administration of commercial plans be placed with cognizant corporate administrative contracting officers.

B. Respondent: Two (4 and 7)

C. Disposition: Concur in part. The proposed rule provides for contractor submission of a commercial plan to (a) the first contracting officer awarding a contract subject to the plan during the offeror's fiscal year or (b) if the offeror has ongoing contracts with commercial plans to the contracting officer responsible for the contract with the latest completion date. The proposed rule further indicates that a new commercial plan is to be submitted 30 days before the end of fiscal year, to the contracting officer responsible for the uncompleted Government contract with the latest completion date.

We do not concur that further clarification of "latest completion date" as the language is clear the date refers to the contract completion date. We do not concur with designating a cognizant corporate administrative contracting officer as responsible for the negotiation, approval and administration of commercial plans. Current procedures for delegation of the authority to negotiate subcontracting plans are included at FAR 42.303 and is within the individual agency's discretion. The 30 day requirement is clarified to 30 working days. This revision is included at TAB A.

COMMENT NUMBER 15

A. Summary of Comment: Commentor recommends evaluation of past performance described at FAR 19.705-4(a)(1) be clarified to specify the offeror's past performance as it relates to meeting its subcontracting goals.

B. Respondent: One (4)

C. Disposition: Do not concur. The proposed rule at FAR 19.705-4(d) describes two different circumstances for evaluating past performance. First, the contracting officer evaluates the offeror's past performance in awarding subcontracts for same or similar products or services to small, small disadvantaged and women-owned small business concerns. Second, if information is not available on a specific type of product or service, the contracting officer evaluate the offeror's overall past performance and considers the performance of other contractors on similar efforts. No revision to the proposed rule is needed.

COMMENT NUMBER 16

A. Summary of Comment: Commentor indicates the procedure for obtaining information from other contracting officers with respect to commercial plans in making a determination to assess liquidated damages is unclear at FAR 19.707-7(f)(3).

B. Respondent: One (4)

C. Disposition: Do not concur. Since there is no coverage at FAR 19.707(f)(3) in the proposed rule or existing coverage, we assume the commentor is referring to coverage at FAR 19.705-7(f)(3) and are responding accordingly. It is inappropriate to dictate how the contracting officer obtains the necessary information and it is at his/her discretion. No revision is needed.

COMMENT NUMBER 17

A. Summary of Comment: The commentor questions why Alternate II of the clause 52.219-9 Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan is not referenced at FAR 19.708(b)(2).

B. Respondent: One (4)

C. Disposition: Do not concur. The prescription for including solicitation provisions and contract clauses at FAR 19.708(b)(1) describes two distinct circumstances for including FAR clause 52.219-9 Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan and its alternates. First, when contracting by negotiation, clause 52.219-9 shall be included in solicitations and contracts meeting the criteria described. When contracting by sealed bidding the clause 52.219-9 with its Alternate I is to be included. When contracting by negotiation and subcontracting plans are required with initial proposals by contracting officer includes the clause 52.219-9 with its Alternate II. FAR clause 52.219-9 and its Alternate I apply to solicitations and contracts dependent upon whether the contract results from a negotiation or sealed bidding acquisition strategy while 52.219-9 with its Alternate II is included in a solicitation using a negotiation acquisition strategy. No revision is needed.

COMMENT NUMBER 18

A. Summary of Comment: Commentor is unaware of any regulatory changes authorizing the use of commercial subcontracting plans prior to OFPP Policy Letter 95-1 and states that this policy letter did not appear to address commercial item subcontractor subcontracting plans.

B. Respondent: One (5)

C. Disposition: Comment is noted. Comment relates to OFPP letter 95-1 and is outside the scope of this case.

COMMENT NUMBER 19

A. Summary of Comment: Commentor indicates that as a result of the Federal Acquisition Reform Act (FARA) certain statutes (15 USC 637(d)(2) and (3) Utilization of Small Business Concerns and 15 USC 637(d)(4) Small Business Subcontracting Plan) are inapplicable to the acquisition of commercially available off-the-shelf items and if the changes published in the *Federal Register* of May 13, 1996 entitled Advance Notice of Proposed Rule Making had gone into effect subcontracting plans for commercial items would have been eliminated. No recommendation for change is included.

B. Respondent: One (5)

C. Disposition: Do not concur. FARA section 4203, addresses commercially available off-the-shelf (COTS) items (as opposed to all commercial items), gave the OFPP Administrator the authority to determine which statutes should be inapplicable to COTS. No determination has been made that Section 8(d) of the Small Business Act is inapplicable to COTS much less all commercial items. The proposed rule cited by the commentor addressing COTS was never converted to a final rule and, therefore, has no bearing on this case. OFPP's pending policy letter on subcontracting, which is to be published shortly as a proposed rule, may be a better vehicle to address these concerns. No change is needed.

COMMENT NUMBER 20

A. Summary of Comment: Commentor asserts that mandatory flowdown of subcontracting provisions to large business first tier subcontractors when supplying commercial items are questionable and should not apply based on FAR 52.244-6 Subcontracts for Commercial Items and Commercial Components. Commentor expresses concern that if the mandatory flowdown subcontracting provisions are not met by the first tier subcontractor, both the prime and subcontractor could be exposed to assessment of liquidated damages. Commentor further recommends the proposed rule clearly exempts commercial item subcontractors from subcontracting plan requirements and this proposed change should be applicable to the date of subcontract award rather than prime contract award resulting in contractors realizing the full benefit of the change.

B. Respondent: One (5)

C. Disposition: Do not concur. The commentor is correct that the clause at 52.244-6, as currently written, does not require flowdown of 52.219-9 (nor for that matter, flowdown of 52.219-8). This comment is outside the scope of this case. Under a separate case, flowdown of subcontracting provisions/clauses are being considered by the Commercial Items Committee. No change is needed.

COMMENT NUMBER 21

A. Summary of Comment: Commentor recommends requirements for subcontractor subcontracting plans allow for plan acceptance without a stated goal commitment when performing under the provisions of and indefinite delivery/indefinite quantity (ID/IQ) contract where a small minimum guarantee is made by the Government to the prime contractor resulting in even smaller amounts of performance anticipated from the subcontractor.

B. Respondent: One (5)

C. Disposition: Comment is noted. Although this comment is beyond the scope of this case, it is expected that the proposed OFPP policy letter to be published shortly will address the treatment of ID/IQ subcontracting plans.

COMMENT NUMBER 22

A. Summary of Comment: Commentor recommends the basic construct of assessing liquidated damages as a proportion of a commercial vendors business related only to items sold to the Government in lieu of the contractor's entire business base.

B. Respondent: One (6)

C. Disposition: Do not concur. The commentor has misunderstood the coverage. There is no need to reconstruct how liquidated damages are assessed under a commercial plan. The liquidated damages are not assessed against the contractor's entire sales, rather to a pro rata share of sales attributable to Government business. See coverage at 19.705-7(f)(3). No change is needed.

COMMENT NUMBER 23

A. Summary of Comment: Commentor questions whether the definition of commercial plan at the proposed FAR 19.701 and 52.219-9(b) is written as intended. The commercial plan is defined to cover the entire production of commercial items sold by either the entire company or a portion thereof (e.g., division, plant or product line. Specifically, the commentor questions whether it is the intent that only items produced and sold in that fiscal year be considered without consideration of items not produced that year yet sold that year.

B. Respondent: One (6)

C. Disposition: Do not concur. The standard of "sold in substantial quantities" for commercial items was not changed for this case. To do as the commentor requests would require changes to industries accounting systems and would not be justified for any benefits derived by the Government.

COMMENT NUMBER 24

A. Summary of Comment: Commentor disagrees with the proposed FAR 52.219-9(d)(10) requiring

compliance with reporting requirements of the form "as provided by agency regulations" that are not stated in the contract or provided in writing to the contractor.

B. Respondent: One (6)

C. Disposition: Do not concur. Commentor has misunderstood how Government regulations operate. Agencies are free to regulate procedures to fit their needs. Contractors are not expected to comply with "agency regulations" that are not published agency regulations, stated in the contract or otherwise provided in writing to the contractor.

COMMENT NUMBER 25

A. Summary of Comment: Commentor describes the merits of the DOD Test Program for Negotiation of Comprehensive Small Business Subcontracting Plans authorized by Section 834 of P.L. 101-189 resulting in increased opportunities for small business and recommends the test program be expressly recognized in regulations for all agencies as an alternative for satisfying small business requirements on a contract-by-contract basis for companies that do not qualify for commercial plans.

B. Respondent: One (7)

C. Disposition: Comment is noted. DOD's Pilot Comprehensive Subcontracting Program is a legislated program and applies only to qualified DOD contractors that are selected to participate in this program. Eligibility of this program is considered in accordance with DFARS 219.7 and is beyond the scope of this case.

COMMENT NUMBER 26

A. Summary of Comment: Commentor recommends contracting officers be explicitly prohibited from imposing additional subcontracting goals not included in an approved commercial plan, i.e., goals based on agency wide policy or to accommodate contract-by-contract needs. The recommendation is made based upon the extensive negotiations required to execute commercial subcontracting plans and the value of commercial plans being diminished or eliminated.

B. Respondent: One (7)

C. Disposition: Do not concur. We believe the imposition of additional subcontracting goals is prohibited by FAR 19.704(d)(1)(ii) which states, "The approved commercial plan shall remain in effect during the offeror's fiscal year for all Government contracts in effect during the period." This recommendation is beyond the scope of this case and removes discretion from the contracting officer.

COMMENT NUMBER 27

A. Summary of Comment: Commentor indicates that the requirement associated with liquidated damages is waived under the DOD Comprehensive Subcontracting Plan Test Program as an incentive for contractors to participate in the Test Program. By waiving the liquidated damages provisions for

commercial plan participants, an incentive exists for contractors to invest resources needed to prepare, negotiate, monitor and institutionalize a process for the first commercial subcontracting plan. Commentor strongly recommends regulations be modified to eliminate the liquidated damages provisions and substitute a periodic evaluation to satisfy Government requirements to measure success or need for corrective action.

B. Respondent: One (7)

C. Disposition: Do not concur. Liquidated damages provisions and its exemptions are set forth in legislation. A commercial plan is not one of the exemptions. Commercial plans cannot be exempted without legislation and as such is beyond the scope of this case.

COMMENT NUMBER 28

A. Summary of Comment: Commentor strongly objects to imposing liquidated damages for a contractor's failure to exert best efforts to achieve small business goals of its subcontracting plan as liquidated damages are significantly disproportionate to the benefits derived while the DOD Comprehensive Subcontracting Test Program provides incentives to enhance and support small business goals.

B. Respondent: One (7)

C. Disposition: Do not concur. Assessment of liquidated damages when the contractor fails to make a good faith effort to achieve its Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan and its goals is legislated, provides a powerful tool to the contracting officer in the administration of subcontracting plans and is in the best interests of United States to ensure a fair proportion of subcontracting opportunities are available to the small business community.

COMMENT NUMBER 29

A. Summary of Comment: Commentor questions whether Subcontracting Plan-Liquidated Damages is separate from the liquidated damages defined at FAR Subpart 11.5 as a contractor failing to make a good faith effort to achieve its subcontracting plan goals will have no impact on contract delivery or performance and the Government will not suffer. No recommendation for revision is made.

B. Respondent: One (8)

C. Disposition: Comment is noted. Subcontracting Plan-Liquidated Damages is separate and apart from the liquidated damages of FAR Subpart 11.5. Assessment of liquidated damages when a contractor fails to make a good faith effort to achieve its small, small disadvantaged and women-owned small business subcontracting plan and its goals is legislated.

COMMENT NUMBER 30

A. Summary of Comment: Commentor indicates offering incentives for attaining or exceeding

subcontracting plan goals appears to more legally supportable rather than taking action against contractors based on ill defined "good faith effort." Commentor did not make a recommendation for change in coverage.

B. Respondent: One (8)

C. Disposition: Comment is noted. Incentives for exceeding subcontracting plan goals is included at existing FAR 19.708(c)(1). No change is needed.

COMMENT NUMBER 31

A. Summary of Comment: Commentor discusses Empowerment Contracting expressing various concerns including its labor-intensive nature and potential contractor loopholes.

B. Respondent: One (8)

C. Disposition: Comment is noted. Empowerment contracting is beyond the scope of this case.

MINORITY POSITION
FAR Case 97-300, Liquidated Damages
FAR 19.705-4(d)(5)

1. Currently FAR 19.705-4(d)(4) [redesignated as (d)(5) by this case] reads:

(d) In determining the acceptability of a proposed subcontracting plan, the contracting officer should take the following actions:

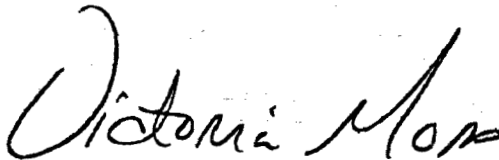
(4) Evaluate subcontracting potential, considering the offeror's make-or-buy policies or programs, the nature of the products or services to be subcontracted, the known availability of small, small disadvantaged and women-owned small business concerns in the geographical area where the work will be performed, and the potential contractor's long-standing contractual relationship with its suppliers.

This final rule would eliminate the highlighted language.

2. Two commenters (NASA and DOE) specifically objected to the elimination of this language. NASA pointed out that (particularly in commercial item contracting) "an offeror might be reluctant to disrupt its existing supplier base in order to satisfy subcontracting plan requirements" but stated that the language in 19.705-4(c) could be construed to cover this situation. DOE stated "Deleting the phrase removes what has traditionally been--and should remain--a legitimate consideration in evaluating subcontracting goals...It conflicts with the Federal Government's own policy of rewarding good past performance."

3. The committee's disposition of this comment, that the list of considerations is not all-inclusive and does not need to address every situation, is not incorrect. However, because the language in question is currently in the FAR, many readers (as evidenced by the NASA and DOE comments) will read the elimination of the phrase as meaning that long-standing contractual relationships should no longer be considered in evaluating a subcontracting plan.

4. For the reasons stated above, I disagree that the language should be removed from the FAR.



Victoria Moss
General Services Administration

Friday
April 11, 1997

Federal Register

Part III

**Department of Defense
General Services
Administration**

**National Aeronautics and
Space Administration**

**48 CFR Part 11, et al.
Federal Acquisition Regulation;
Liquidated Damages; Proposed Rule**

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 11, 19, 52, and 53**

[FAR Case 97-300]

RIN 9000-AH53

**Federal Acquisition Regulation;
Liquidated Damages**

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council (CAAC) and the Defense Acquisition Regulations (DAR) Council are proposing to amend the Federal Acquisition Regulation (FAR) to clarify policy on liquidated damages and commercial subcontracting plans and to implement OFPP Policy Letter 95-1, Subcontracting Plans for Companies Supplying Commercial Items. Comments received under the existing interim rule FAR case 89-042, Liquidated Damages, will be addressed under this new FAR case 97-300. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993. This is not a major rule under 5 U.S.C. 804.

DATES: Comments should be submitted on or before June 10, 1997 to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (MVRs), 1800 F Street, NW., Room 4035, Washington, DC 20405. E-mail comments submitted over Internet should be addressed to: 97-300@www.arnet.gov. Please cite FAR case 97-300 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: Ms. Linda Klein at (202) 501-3775 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501-4755. Please cite FAR case 97-300.

SUPPLEMENTARY INFORMATION:**A. Background**

An interim rule, under FAR case 89-042, was published on July 21, 1989 (54

FR 30708), to require a prime contractor to pay liquidated damages upon a finding of lack of good faith efforts to meet its small business subcontracting goals. This rule implements Section 304 of the Business Opportunity Development Reform Act of 1988, Public Law 100-656.

Significant revisions to the interim rule were proposed based on analysis of public comments. Extensive discussions took place regarding long-standing problems of trying to extend and adapt the requirement of Section 8(d) of the Small Business Act to contracts for commercial products, now compounded by the introduction of liquidated damages. To resolve those problems, the case has been held pending release and conformance to Federal Acquisition Circular (FAC) 90-32, published on September 18, 1995 (60 FR 48231), FAR case 94-790, "Acquisition of Commercial Items", and OFPP Policy Letter 95-1, "Subcontracting Plans for Companies Supplying Commercial Items".

On January 17, 1997, the CAAC and the DAR Council agreed to close FAR case 89-042, Liquidated Damages, into new FAR case 97-300. All of the issues raised, and public comments submitted, in response to the interim rule published under FAR case 89-042, will be addressed under the new FAR case 97-300.

B. Regulatory Flexibility Act

This proposed rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the proposed changes clarify policy on liquidated damages and commercial subcontracting plans and the changes are not expected to increase or decrease small business awards, and because small businesses are exempt from subcontracting plan requirements per FAR 19.702(b). An Initial Regulatory Flexibility Analysis has, therefore, not been performed. Comments from small entities concerning the affected FAR subparts will be considered in accordance with 5 U.S.C. 610 of the Act. Such comments must be submitted separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 97-300), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act (Public Law 96-511) is deemed to apply because FAR case 97-300, in part, adds additional requirements that the subcontracting plan shall include. Therefore, a request for approval of a revised burden estimate for OMB

clearance 9000-0006 has been submitted to the Office of Management and Budget under 44 U.S.C. 3501, *et seq.* Public comments concerning this request will be invited through a Federal Register notice.

List of Subjects in 48 CFR Parts 11, 19, 52, and 53

Government procurement.

Dated: April 2, 1997.

Jeremy F. Olson,
Acting Director, Federal Acquisition Policy Division.

Therefore, it is proposed that 48 CFR Parts 11, 19, 52, and 53 be amended as set forth below:

1. The authority citation for 48 CFR Parts 11, 19, 52, and 53 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

**PART 11—DESCRIBING AGENCY
NEEDS**

2. Section 11.501 is revised to read as follows:

11.501 General.

This subpart provides policies and procedures for the use of liquidated damages clauses in solicitations and contracts for supplies, services, and construction, except for the Liquidated Damages—Subcontracting Plan Clause at 52.219-16, which may be applied pursuant to 19.705-7.

**PART 19—SMALL BUSINESS
PROGRAMS**

3. Section 19.701 is amended by adding, in alphabetical order, definitions for "Commercial plan", "Individual contract plan" and "Master plan" to read as follows:

19.701 Definitions.

Commercial plan, as used in this subpart, means a subcontracting plan that covers the offeror's fiscal year and that applies to the entire production of commercial items sold by either the entire company or a portion thereof (e.g., division, plant, or product line).

* * * * *

Individual contract plan, as used in this subpart, means a subcontracting plan that covers the entire contract period (including option periods), applies to a specific contract, and has goals that are based on the offeror's planned subcontracting in support of the specific contract, except that indirect costs incurred for common or joint purposes may be allocated on a prorated basis to the contract.

Master plan, as used in this subpart, means a subcontracting plan that

contains all of the required elements of the individual plans, except goals, and may be incorporated into individual contract plans, provided the master plan has been approved.

* * * * *

4. Section 19.702 is amended by revising paragraph (a) introductory text and (b)(4) to read as follows:

19.702 Statutory requirements.

* * * * *

(a) Except as stated in paragraph (b) of this section, Section 8(d) of the Small Business Act (15 U.S.C. 637(d)) imposes the following requirements regarding subcontracting with small businesses and small business subcontracting plans.

* * * * *

(b) * * *

(4) For in scope modifications to contracts that do not contain the clause at 52.219-8, Utilization of Small, Small Disadvantaged and Women-Owned Small Business Concerns (or equivalent prior Defense Acquisition Regulation, Federal Procurement Regulations, or National Aeronautics and Space Administration clauses); e.g., contracts awarded before Public Law 95-507.

* * * * *

5. Section 19.703(b) is amended by revising the first sentence to read as follows:

19.703 Eligibility requirements for participating in the program.

* * * * *

(b) A contractor acting in good faith may rely on the written representation of its subcontractor regarding the subcontractor's status as either a small business concern, a small disadvantaged business concern or a women-owned small business concern. * * *

6. Section 19.704 is amended—(a) By redesignating paragraphs (a)(2) through (a)(6) as (a)(7) through (a)(11), respectively;

(b) By adding new paragraphs (a)(2) through (a)(6) and (d);

(c) In newly-designated (a)(8) by removing the word "will" the second time it appears, and

(d) By revising newly-designated paragraphs (a) (10) and (11) and paragraphs (b) in the first sentence and (c). The revised and added text reads as follows:

19.704 Subcontracting plan requirements.

* * * * *

(a) * * *

(2) A statement of total dollars planned to be subcontracted and a statement of the total dollars planned to be subcontracted to small, small

disadvantaged and women-owned small business concerns;

(3) A description of the principal types of supplies and services to be subcontracted and an identification of the types planned for subcontracting to small, small disadvantaged and women-owned small business concerns;

(4) A description of the methods used to develop the subcontracting goals;

(5) A description of the methods used to identify potential sources for solicitation purposes;

(6) A statement as to whether or not the offeror included indirect costs in establishing subcontracting goals, and a description of the method used to determine the proportionate share of indirect costs to be incurred with small, small disadvantaged and women-owned small business concerns;

* * * * *

(10) Assurances that the offeror will

(i) Cooperate in any studies or surveys as may be required,

(ii) Submit periodic reports so that the Government can determine the extent of compliance by the offeror with the subcontracting plan, and

(iii) Submit Standard Form (SF) 294, Subcontracting Report for Individual Contracts, and SF 295, Summary Subcontract Report, following the instructions on the forms or as provided in agency regulations; and

(iv) Ensure that its subcontractors agree to submit SF's 294 and 295;

(11) A description of the types of records that will be maintained concerning procedures adopted to comply with the requirements and goals in the plan, including establishing source lists; and a description of the offeror's efforts to locate small, small disadvantaged and women-owned small business concerns and to award subcontracts to them.

(b) Contractors may establish, on a plant- or division-wide basis, a master plan (see 19.701) which contains all the elements required by the clause at 52.219-9, Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan, except goals.

* * *

(c) For multiyear contracts or contracts containing options, the cumulative value of the basic contract and all options is considered in determining whether a subcontracting plan is necessary (see 19.705-2(a)). If a plan is necessary and the offeror is submitting an individual contract plan, the plan shall contain all the elements required by 19.704(a) and shall contain separate statements and goals for the basic contract and for each option.

(d) A commercial plan (as defined in 19.701) is the preferred type of

subcontracting plan for contractors furnishing commercial items. The contractor shall:

(1) Submit the commercial plan to either

(i) The first contracting officer awarding a contract subject to the plan during the offeror's fiscal year, or

(ii) If the offeror has ongoing contracts with commercial plans, to the contracting officer responsible for the contract with the latest completion date. The contracting officer shall negotiate the commercial plan for the Government. The approved commercial plan shall remain in effect during the offeror's fiscal year for all Government contracts in effect during the period.

(2) Submit a new commercial plan, 30 days before the end of the fiscal year, to the contracting officer responsible for the uncompleted Government contract with the latest completion date. The contractor must provide to each contracting officer responsible for an ongoing contract subject to the plan, the identity of the contracting officer that will be negotiating the new plan. Once the new commercial plan is approved, the contractor shall provide a copy of the approved plan to each contracting officer responsible for an ongoing contract that is subject to the plan.

7. Section 19.705-4 is amended—

(a) In the first sentence of paragraphs (b) and (c) by removing "six" and inserting "eleven" in its place,

(b) Paragraph (b) is further amended in the second sentence by removing "six";

(c) Paragraph (c) is further amended by revising the third sentence and by adding a sentence between the second and third sentences;

(d) By revising paragraph (d)(1); and

(e) By redesignating paragraphs (d)(3) through (d)(6) as (d)(4) through (d)(7), respectively, adding a new paragraph (d)(3); and revising newly-designated (d)(5). The new and revised text reads as follows:

19.705-4 Reviewing the subcontracting plan.

* * * * *

(c) * * * The contracting officer shall take particular care to ensure that the offeror has not submitted unreasonably low goals in order to minimize exposure to liquidated damages and to avoid the administrative burden of substantiating good faith efforts. Additionally, particular attention should be paid to the identification of steps that, if taken, would be considered a good faith effort.

* * *

(d) * * *

(1) Obtain information available from the cognizant administrative contracting

office, as provided for in 19.706(a), and evaluate the offeror's past performance in awarding subcontracts for the same or similar products or services to small, small disadvantaged and women-owned small business concerns. If information is not available on a specific type of product or service, evaluate the offeror's overall past performance and consider the performance of other contractors on similar efforts.

* * * * *

(3) Ensure that the subcontracting goals are consistent with the offeror's cost and pricing data.

* * * * *

(5) Evaluate subcontracting potential, considering the offeror's make-or-buy policies or programs, the nature of the supplies or services to be subcontracted, the known availability of small, small disadvantaged and women-owned small business concerns in the geographical area where the work will be performed.

* * * * *

8. Section 19.705-6 is amended by revising the introductory text and paragraphs (b) and (g) to read as follows:

19.705-6 Postaward responsibilities of the contracting officer.

After a contract or contract modification containing a subcontracting plan is awarded, the contracting officer who approved the plan is responsible for the following:

* * * * *

(b) Forwarding a copy of each commercial plan and any associated approvals to the Assistant Regional Administrator for Procurement Assistance in the SBA region where the contractor's headquarters is located.

* * * * *

(g) Taking action to enforce the terms of the contract upon receipt of a notice under 19.706(f).

9. Section 19.705-7 is amended by revising paragraphs (b), (c), and (f) and the last sentence of paragraph (d); and by adding (h) to read as follows:

19.705-7 Liquidated damages.

* * * * *

(b) The amount of damages attributable to the contractor's failure to comply shall be an amount equal to the actual dollar amount by which the contractor failed to achieve each subcontracting goal.

(c) If, at completion of the basic contract or any option, or in the case of a commercial plan, at the close of the fiscal year for which the plan is applicable, a contractor has failed to meet its subcontracting goals, the contracting officer shall review all available information for an indication

that the contractor has not made a good faith effort to comply with the plan. If no such indication is found, the contracting officer shall document the file accordingly. If the contracting officer decides in accordance with paragraph (d) of this subsection that the contractor failed to make a good faith effort to comply with its subcontracting plan, the contracting officer shall give the contractor written notice specifying the failure, advising the contractor of the possibility that the contractor may have to pay to the Government liquidated damages, and providing a period of 15 working days (or longer period as necessary) within which to respond. The notice shall give the contractor an opportunity to demonstrate what good faith efforts have been made before the contracting officer issues the final decision, and shall further state that failure of the contractor to respond may be taken as an admission that no valid explanation exists.

(d) * * * However, when considered in the context of the contractor's total effort in accordance with its plan, the following, though not all inclusive, may be considered as indicators of a failure to make a good faith effort: a failure to attempt to identify, contact, solicit, or consider for contract award small, small disadvantaged or women-owned small business concerns; a failure to designate and maintain a company official to administer the subcontracting program and monitor and enforce compliance with the plan; a failure to submit Standard Form (SF) 294, Subcontracting Report for Individual Contracts, and Standard Form (SF) 295, Summary Subcontract Report, in accordance with instructions on the forms or as provided in agency regulations; a failure to maintain records or otherwise demonstrate procedures adopted to comply with the plan; and the adoption of company policies or procedures which have as their objectives the frustration of the objectives of the plan.

* * * * *

(f) With respect to commercial plans approved under the clause at 52.219-9, Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan, the contracting officer that approved the plan shall—

(1) Perform the functions of the contracting officer under this subsection on behalf of all agencies with contracts covered by the commercial plan;

(2) Determine whether or not the goals in the commercial plan were achieved and, if they were not achieved, review all available information for an indication that the contractor has not

made a good faith effort to comply with the plan, document the results of the review, and provide a copy to the other contracting officers with contracts subject to the commercial plan as listed in the *Remarks* block of the SF 295; and

(3) If a determination is made to assess liquidated damages, request other contracting officers with contracts incorporating the plan to provide the amount of payments made under their Government contracts subject to the plan that contributed to the contractor's total sales during the contractor's fiscal year in order to calculate and assess liquidated damages on the Government's behalf. For example: The contractor's total sales are \$50 million and the subcontracting dollars to support the sales are \$20 million, or 40 percent. The Government's payments under contracts subject to the plan contributing to the contractor's total sales are \$5 million. Therefore, the pro rata share of subcontracting attributable to the Government contracts covered by the plan is 10 percent of \$20 million, or \$2 million. If the contractor failed to achieve its small business goal by 1 percent, the liquidated damages would be calculated as 1 percent of \$2 million. A copy of the contracting officer's final decision assessing liquidated damages shall be provided to other contracting officers with contracts subject to the commercial plan as listed in the *Remarks* block of the SF 295.

* * * * *

(h) Every contracting officer with a contract that is subject to a commercial plan shall include in the contract file—

(1) A copy of the approved plan,

(2) A copy of the determination regarding goal achievement and (if applicable) whether the contractor made a good faith effort to comply with the plan, and

(3) A copy of the final decision assessing liquidating damages, if applicable.

10. Section 19.706 is amended in paragraph (a) by removing the paragraph designation "(a)"; by removing paragraph (b); by redesignating (a)(1) through (a)(6) as (a) through (f), respectively; in newly-designated (e) by removing "and" at the end; in newly-designated (f) by removing the period at the end and inserting "; and" in its place; and by adding (g) to read as follows:

19.706 Responsibilities of the cognizant administrative contracting officer.

* * * * *

(g) Immediate notice that performance under a contract is complete, that the goals were or were not met, and if not met, whether there is any indication of

a lack of a good faith effort to comply with the subcontracting plan.

19.708 [Amended]

11. Section 19.708 is amended in paragraph (b)(2) by adding "the clause with" after the words "Plan, or"; in the parenthetical citation in (c)(1) by removing "(a)(1)"; and in the second sentence of (c)(2) by removing "award fee" and inserting "award-fee" in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

12. Section 52.219-9 is amended by revising the clause date and paragraphs (b), (d)(2)(i), (d)(10), (d)(11) first sentence of introductory text, (d)(11)(vi) second sentence, (f) introductory text, and (g) to read as follows:

52.219-9 Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan.

* * * * *

SMALL, SMALL DISADVANTAGED AND WOMEN-OWNED SMALL BUSINESS SUBCONTRACTING PLAN (XXX 1997)

* * * * *

(b) *Definitions.* As used in this clause—

Commercial item means a product or service that satisfies the definition of commercial item in section 2.101 of the Federal Acquisition Regulation.

Commercial plan means a subcontracting plan that covers the offeror's fiscal year and that applies to the entire production of commercial items sold by either the entire company or a portion thereof (e.g., division, plant, or product line).

Individual contract plan means a subcontracting plan that covers the entire contract period (including option periods), applies to a specific contract, and has goals that are based on the offeror's planned subcontracting in support of the specific contract, except that indirect costs incurred for common or joint purposes may be allocated on a prorated basis to the contract.

Master plan means a subcontracting plan that contains all of the required elements of the individual plans, except goals, and may

be incorporated into individual plans, provided the master plan has been approved.

Subcontract means any agreement (other than one involving an employer-employee relationship) entered into by a Federal Government prime contractor or subcontractor calling for supplies or services required for performance of the contract or subcontract.

* * * * *

(d) * * *

(2) * * *

(i) Total dollars planned to be subcontracted for individual plans; or the offeror's total projected sales, expressed in dollars, and the total value of projected subcontracts to support the sales for commercial plans;

* * * * *

(10) Assurances that the offeror will (i) cooperate in any studies or surveys as may be required, (ii) submit periodic reports so that the Government can determine the extent of compliance by the offeror with the subcontracting plan, and (iii) submit Standard Form (SF) 294, Subcontracting Report for Individual Contracts, and SF 295, Summary Subcontract Report, following the instructions on the forms or as provided in agency regulations; and (iv) ensure that its subcontractors agree to submit SF's 294 and 295.

(11) A description of the types of records that will be maintained concerning procedures that have been adopted to comply with the requirements and goals in the plan, including establishing source lists; and a description of the offeror's efforts to locate small, small disadvantaged and women-owned small business concerns and to award subcontracts to them. * * *

* * * * *

(vi) * * * Contractors having commercial plans need not comply with this requirement.

* * * * *

(f) A master plan on a plant or division-wide basis which contains all the elements required by paragraph (d) of this clause, except goals, may be incorporated by reference as a part of the subcontracting plan required of the offeror by this clause; provided, * * *

(g) A commercial plan is the preferred type of subcontracting plan for contractors furnishing commercial items (see paragraph

(b) of this clause). The commercial plan shall relate to the offeror's planned subcontracting generally, for both commercial and Government business, rather than solely to the Government contract.

* * * * *

(End of clause)

* * * * *

13. Section 52.219-16 is amended—

(a) By revising the clause date;

(b) In the first sentence of paragraph (b) by removing the word "product"; by adding a sentence at the beginning of (b); and by revising the last sentence;

(c) In (c) at the end of the first sentence, before the period, by adding "and to discuss the matter"; and

(d) By revising (d) to read as follows:

52.219-16 Liquidated Damages—Subcontracting Plan.

* * * * *

LIQUIDATED DAMAGES—SUBCONTRACTING PLAN (XXX 1997)

* * * * *

(b) Performance shall be measured by applying the percentage goals to the total actual subcontracting dollars or, if a commercial plan is involved, to the pro rata share of actual subcontracting dollars attributable to Government contracts covered by the commercial plan. * * * The amount of probable damages attributable to the Contractor's failure to comply, shall be an amount equal to the actual dollar amount by which the Contractor failed to achieve each subcontract goal.

* * * * *

(d) With respect to commercial plans, the Contracting Officer who approved the plan will perform the functions of the Contracting Officer under this clause on behalf of all agencies with contracts covered by the commercial plan.

* * * * *

(End of clause)

PART 53—FORMS

14. Section 53.301-294 is revised to read as follows:

BILLING CODE 6820-EP-P

REQUEST FOR PUBLICATION

FAR Case 97-300, LIQUIDATED DAMAGES

I am requesting the following special handling for this document:

_____ **Requested publication date:** Please publish this document on 4/9/97. If there is a problem, please contact us in time for resolution.

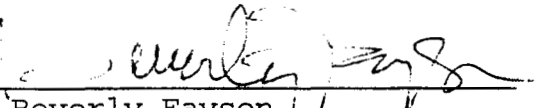
_____ **Emergency filing or publication:** Attached is a letter explaining the need for emergency filing or publication.

X **Confirm publication date:** Please call me to confirm the publication date, comment closing date, and/or separate part number of this document.

X **Separate Part:** Please publish this document in a separate part of the Federal Register. When there are other proposed, interim, or final rules appearing in the same issue, please combine them in the same separate part.

X **Diskette Certification:** I hereby certify that the electronic transmittal, in ASCII, is identical to the hard-copy document of FAR Case 96-005, Performance-Based Payments.

Signed


Beverly Fayson
FAR Secretariat

Date:

4/2/97

Telephone: 202-501-4755

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 11, 19, 52, and 53

[FAR Case 97-300]

RIN 9000-AH53

Federal Acquisition Regulation; Liquidated Damages

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council (CAAC) and the Defense Acquisition Regulations (DAR) Council are proposing to amend the Federal Acquisition Regulation (FAR) to clarify policy on liquidated damages and commercial subcontracting plans and to implement OFPP Policy Letter 95-1, Subcontracting Plans for Companies Supplying Commercial Items. Comments received under the existing interim rule FAR case 89-042, Liquidated Damages, will be addressed under this new FAR case 97-300. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993. This is not a major rule under 5 U.S.C. 804.

DATES: Comments should be submitted on or before **[60 days after Federal Register publication date]** to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to:

General Services Administration
FAR Secretariat (MVRs)
1800 F Street, NW, Room 4035
Washington, DC 20405

E-mail comments submitted over Internet should be addressed to: 97-300@www.arnet.gov. Please cite FAR case 97-300 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: Ms. Linda Klein at (202) 501-3775 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4035, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAR case 97-300.

SUPPLEMENTARY INFORMATION:

A. Background

An interim rule, under FAR case 89-042, was published on July 21, 1989 (54 FR 30708), to require a prime contractor to pay liquidated damages upon a finding of lack of good faith efforts to meet its small business subcontracting goals. This rule implements Section 304 of the Business Opportunity Development Reform Act of 1988, Public Law 100-656.

Significant revisions to the interim rule were proposed based on analysis of public comments. Extensive discussions took place regarding long-standing problems of trying to extend and adapt the requirement of Section 8(d) of the Small Business Act to contracts for commercial products, now compounded by the introduction of liquidated damages. To resolve those problems, the case has been held pending

release and conformance to Federal Acquisition Circular (FAC) 90-32, published on September 18, 1995 (60 FR 48231), FAR case 94-790, "Acquisition of Commercial Items", and OFPP Policy Letter 95-1, "Subcontracting Plans for Companies Supplying Commercial Items".

On January 17, 1997, the CAAC and the DAR Council agreed to close FAR case 89-042, Liquidated Damages, into new FAR case 97-300. All of the issues raised, and public comments submitted, in response to the interim rule published under FAR case 89-042, will be addressed under the new FAR case 97-300.

B. Regulatory Flexibility Act

This proposed rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because the proposed changes clarify policy on liquidated damages and commercial subcontracting plans and the changes are not expected to increase or decrease small business awards, and because small businesses are exempt from subcontracting plan requirements per FAR 19.702(b). An Initial Regulatory Flexibility Analysis has, therefore, not been performed. Comments from small entities concerning the affected FAR subparts will be considered in accordance with 5 U.S.C. 610 of the Act. Such comments must be submitted separately and should cite 5 U.S.C. 601, et seq. (FAR case 97-300), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act (Public Law 96-511) is deemed to apply because FAR case 97-300, in part, adds additional requirements that the subcontracting plan shall include. Therefore, a request for approval of a revised burden estimate for OMB clearance 9000-0006 has been submitted to the Office of Management and Budget under 44 U.S.C. 3501, et seq. Public comments concerning this request will be invited through a Federal Register notice.

List of Subjects in 48 CFR Parts 11, 19, 52, and 53:

Government procurement.

Dated: 4-2-97


JEREMY F. OLSON,
Acting Director,
Federal Acquisition Policy Division.

Therefore, it is proposed that 48 CFR Parts 11, 19, 52, and 53 be amended as set forth below:

1. The authority citation for 48 CFR Parts 11, 19, 52, and 53 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 11—DESCRIBING AGENCY NEEDS

2. Section 11.501 is revised to read as follows:

11.501 General.

This subpart provides policies and procedures for the use of liquidated damages clauses in solicitations and contracts for supplies, services, and construction, except for the Liquidated Damages—Subcontracting Plan Clause at 52.219-16, which may be applied pursuant to 19.705-7.

PART 19—SMALL BUSINESS PROGRAMS

3. Section 19.701 is amended by adding, in alphabetical order, definitions for "Commercial plan", "Individual contract plan" and "Master plan" to read as follows:

19.701 Definitions.

Commercial plan, as used in this subpart, means a subcontracting plan that covers the offeror's fiscal year and that applies to the entire production of commercial items sold by either the entire company or a portion thereof (e.g., division, plant, or product line).

* * * * *

Individual contract plan, as used in this subpart, means a subcontracting plan that covers the entire contract period (including option periods), applies to a specific contract, and has goals that are based on the offeror's planned subcontracting in support of the specific contract, except that indirect costs incurred for common or joint purposes may be allocated on a prorated basis to the contract.

Master plan, as used in this subpart, means a subcontracting plan that contains all of the required elements of the individual plans, except goals, and may be incorporated into individual contract plans, provided the master plan has been approved.

* * * * *

4. Section 19.702 is amended by revising paragraph (a) introductory text and (b) (4) to read as follows:

19.702 Statutory requirements.

* * * * *

(a) Except as stated in paragraph (b) of this section, Section 8(d) of the Small Business Act (15 U.S.C. 637(d)) imposes the following requirements regarding subcontracting with small businesses and small business subcontracting plans.

* * * * *

(b) * * *

(4) For in scope modifications to contracts that do not contain the clause at 52.219-8, Utilization of Small, Small Disadvantaged and Women-Owned Small Business Concerns

(or equivalent prior Defense Acquisition Regulation, Federal Procurement Regulations, or National Aeronautics and Space Administration clauses); e.g., contracts awarded before Public Law 95-507.

* * * * *

5. Section 19.703(b) is amended by revising the first sentence to read as follows:

19.703 Eligibility requirements for participating in the program.

* * * * *

(b) A contractor acting in good faith may rely on the written representation of its subcontractor regarding the subcontractor's status as either a small business concern, a small disadvantaged business concern or a women-owned small business concern. * * *

6. Section 19.704 is amended—

(a) By redesignating paragraphs (a)(2) through (a)(6) as (a)(7) through (a)(11), respectively;

(b) By adding new paragraphs (a)(2) through (a)(6) and (d);

(c) In newly-designated (a)(8) by removing the word "will" the second time it appears, and

(d) By revising newly-designated paragraphs (a)(10) and (11) and paragraphs (b) in the first sentence and (c).

The revised and added text reads as follows:

19.704 Subcontracting plan requirements.

* * * * *

(a) * * *

(2) A statement of total dollars planned to be subcontracted and a statement of the total dollars planned to be subcontracted to small, small disadvantaged and women-owned small business concerns;

(3) A description of the principal types of supplies and services to be subcontracted and an identification of the types planned for subcontracting to small, small disadvantaged and women-owned small business concerns;

(4) A description of the methods used to develop the subcontracting goals;

(5) A description of the methods used to identify potential sources for solicitation purposes;

(6) A statement as to whether or not the offeror included indirect costs in establishing subcontracting goals, and a description of the method used to determine the proportionate share of indirect costs to be incurred with small, small disadvantaged and women-owned small business concerns;

* * * * *

(10) Assurances that the offeror will (i) cooperate in any studies or surveys as may be required, (ii) submit periodic reports so that the Government can determine the extent of compliance by the offeror with the subcontracting plan, and (iii) submit Standard Form (SF) 294, Subcontracting Report for Individual Contracts, and SF 295, Summary Subcontract Report, following the instructions on the forms

or as provided in agency regulations; and (iv) ensure that its subcontractors agree to submit SF's 294 and 295; and

(11) A description of the types of records that will be maintained concerning procedures adopted to comply with the requirements and goals in the plan, including establishing source lists; and a description of the offeror's efforts to locate small, small disadvantaged and women-owned small business concerns and to award subcontracts to them.

(b) Contractors may establish, on a plant or division-wide basis, a master plan (see 19.701) which contains all the elements required by the clause at 52.219-9, Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan, except goals. * * *

(c) For multiyear contracts or contracts containing options, the cumulative value of the basic contract and all options is considered in determining whether a subcontracting plan is necessary (see 19.705-2(a)). If a plan is necessary and the offeror is submitting an individual contract plan, the plan shall contain all the elements required by 19.704(a) and shall contain separate statements and goals for the basic contract and for each option.

(d) A commercial plan (as defined in 19.701) is the preferred type of subcontracting plan for contractors furnishing commercial items. The contractor shall:

(1) Submit the commercial plan to either (i) the first contracting officer awarding a contract subject to the plan during the offeror's fiscal year, or (ii) if the offeror

has ongoing contracts with commercial plans, to the contracting officer responsible for the contract with the latest completion date. The contracting officer shall negotiate the commercial plan for the Government. The approved commercial plan shall remain in effect during the offeror's fiscal year for all Government contracts in effect during the period.

(2) Submit a new commercial plan, 30 days before the end of the fiscal year, to the contracting officer responsible for the uncompleted Government contract with the latest completion date. The contractor must provide to each contracting officer responsible for an ongoing contract subject to the plan, the identity of the contracting officer that will be negotiating the new plan. Once the new commercial plan is approved, the contractor shall provide a copy of the approved plan to each contracting officer responsible for an ongoing contract that is subject to the plan.

7. Section 19.705-4 is amended—

(a) In the first sentence of paragraphs (b) and (c) by removing "six" and inserting "eleven" in its place,

(b) Paragraph (b) is further amended in the second sentence by removing "six";

(c) Paragraph (c) is further amended by revising the third sentence and by adding a sentence between the second and third sentences;

(d) By revising paragraph (d)(1); and

(e) By redesignating paragraphs (d)(3) through (d)(6) as (d)(4) through (d)(7), respectively, adding a new paragraph (d)(3); and revising newly-designated (d)(5). The new and revised text reads as follows:

19.705-4 Reviewing the subcontracting plan.

* * * *

(c) * * * The contracting officer shall take particular care to ensure that the offeror has not submitted unreasonably low goals in order to minimize exposure to liquidated damages and to avoid the administrative burden of substantiating good faith efforts. Additionally, particular attention should be paid to the identification of steps that, if taken, would be considered a good faith effort. * * *

(d) * * *

(1) Obtain information available from the cognizant administrative contracting office, as provided for in 19.706(a), and evaluate the offeror's past performance in awarding subcontracts for the same or similar products or services to small, small disadvantaged and women-owned small business concerns. If information is not available on a specific type of product or service, evaluate the offeror's overall past performance and consider the performance of other contractors on similar efforts.

* * * *

(3) Ensure that the subcontracting goals are consistent with the offeror's cost and pricing data.

* * * *

(5) Evaluate subcontracting potential, considering the offeror's make-or-buy policies or programs, the nature of the supplies or services to be subcontracted, the known availability of small, small disadvantaged and women-owned small business concerns in the geographical area where the work will be performed.

* * * * *

8. Section 19.705-6 is amended by revising the introductory text and paragraphs (b) and (g) to read as follows:

19.705-6 Postaward responsibilities of the contracting officer.

After a contract or contract modification containing a subcontracting plan is awarded, the contracting officer who approved the plan is responsible for the following:

* * * * *

(b) Forwarding a copy of each commercial plan and any associated approvals to the Assistant Regional Administrator for Procurement Assistance in the SBA region where the contractor's headquarters is located.

* * * * *

(g) Taking action to enforce the terms of the contract upon receipt of a notice under 19.706(f).

9. Section 19.705-7 is amended by revising paragraphs (b), (c), and (f); by amending (d) in the last sentence; and by adding (h) to read as follows:

19.705-7 Liquidated damages.

* * * * *

(b) The amount of damages attributable to the contractor's failure to comply shall be an amount equal to the actual dollar amount by which the contractor failed to achieve each subcontracting goal.

(c) If, at completion of the basic contract or any option, or in the case of a commercial plan, at the close of the fiscal year for which the plan is applicable, a contractor has failed to meet its subcontracting goals, the contracting officer shall review all available information for an indication that the contractor has not made a good faith effort to comply with the plan. If no such indication is found, the contracting officer shall document the file accordingly. If the contracting officer decides in accordance with paragraph (d) of this subsection that the contractor failed to make a good faith effort to comply with its subcontracting plan, the contracting officer shall give the contractor written notice specifying the failure, advising the contractor of the possibility that the contractor may have to pay to the Government liquidated damages, and providing a period of 15 working days (or longer period as necessary) within which to respond. The notice shall give the contractor an opportunity to demonstrate what good faith efforts have been made before the contracting officer issues the final decision, and shall further state

that failure of the contractor to respond may be taken as an admission that no valid explanation exists.

(d) * * * However, when considered in the context of the contractor's total effort in accordance with its plan, the following, though not all inclusive, may be considered as indicators of a failure to make a good faith effort: a failure to attempt to identify, contact, solicit, or consider for contract award small, small disadvantaged or women-owned small business concerns; a failure to designate and maintain a company official to administer the subcontracting program and monitor and enforce compliance with the plan; a failure to submit Standard Form (SF) 294, Subcontracting Report for Individual Contracts, and Standard Form (SF) 295, Summary Subcontract Report, in accordance with instructions on the forms or as provided in agency regulations; a failure to maintain records or otherwise demonstrate procedures adopted to comply with the plan; and the adoption of company policies or procedures which have as their objectives the frustration of the objectives of the plan.

* * * * *

(f) With respect to commercial plans approved under the clause at 52.219-9, Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan, the contracting officer that approved the plan shall—

(1) Perform the functions of the contracting officer under this subsection on behalf of all agencies with contracts covered by the commercial plan;

(2) Determine whether or not the goals in the commercial plan were achieved and, if they were not achieved, review all available information for an indication that the contractor has not made a good faith effort to comply with the plan, document the results of the review, and provide a copy to the other contracting officers with contracts subject to the commercial plan as listed in the Remarks block of the SF 295; and

(3) If a determination is made to assess liquidated damages, request other contracting officers with contracts incorporating the plan to provide the amount of payments made under their Government contracts subject to the plan that contributed to the contractor's total sales during the contractor's fiscal year in order to calculate and assess liquidated damages on the Government's behalf. For example: The contractor's total sales are \$50 million and the subcontracting dollars to support the sales are \$20 million, or 40 percent. The Government's payments under contracts subject to the plan contributing to the contractor's total sales are \$5 million. Therefore, the pro rata share of subcontracting attributable to the Government contracts covered by the plan is 10 percent of \$20 million, or \$2 million. If the contractor failed to achieve its small business goal by 1 percent, the liquidated damages would be calculated as 1 percent of \$2 million. A copy of the contracting officer's final decision assessing liquidated damages shall be provided to other contracting officers with

contracts subject to the commercial plan as listed in the Remarks block of the SF 295.

* * * * *

(h) Every contracting officer with a contract that is subject to a commercial plan shall include in the contract file (1) a copy of the approved plan, (2) a copy of the determination regarding goal achievement and (if applicable) whether the contractor made a good faith effort to comply with the plan, and (3) a copy of the final decision assessing liquidating damages, if applicable.

10. Section 19.706 is amended in paragraph (a) by removing the paragraph designation "(a)"; by removing paragraph (b); by redesignating (a)(1) through (a)(6) as (a) through (f), respectively; in newly-designated (e) by removing "and" at the end; in newly-designated (f) by removing the period at the end and inserting "; and" in its place; and by adding (g) to read as follows:

**19.706 Responsibilities of the cognizant
administrative contracting officer.**

* * * * *

(g) Immediate notice that performance under a contract is complete, that the goals were or were not met, and if not met, whether there is any indication of a lack of a good faith effort to comply with the subcontracting plan.

19.708 [Amended]

11. Section 19.708 is amended in paragraph (b)(2) by adding "the clause with" after the words "Plan, or"; in the

parenthetical citation in (c)(1) by removing "(a)(1)"; and in the second sentence of (c)(2) by removing "award fee" and inserting "award-fee" in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

12. Section 52.219-9 is amended by revising the clause date and paragraphs (b), (d)(2)(i), (d)(10), (d)(11) first sentence of introductory text, (d)(11)(vi) second sentence, (f) introductory text, and (g) to read as follows:

**52.219-9 Small, Small Disadvantaged and Women-Owned
Small Business Subcontracting Plan.**

* * * * *

SMALL, SMALL DISADVANTAGED AND WOMEN-OWNED SMALL BUSINESS
SUBCONTRACTING PLAN (XXX 1997)

* * * * *

(b) Definitions. As used in this clause—

Commercial item means a product or service that satisfies the definition of commercial item in section 2.101 of the Federal Acquisition Regulation.

Commercial plan means a subcontracting plan that covers the offeror's fiscal year and that applies to the entire production of commercial items sold by either the entire company or a portion thereof (e.g., division, plant, or product line).

Individual contract plan means a subcontracting plan that covers the entire contract period (including option periods), applies to a specific contract, and has goals that are based on the offeror's planned subcontracting in support of the specific contract, except that indirect costs incurred for common or joint purposes may be allocated on a prorated basis to the contract.

Master plan means a subcontracting plan that contains all of the required elements of the individual plans, except goals, and may be incorporated into individual plans, provided the master plan has been approved.

Subcontract means any agreement (other than one involving an employer-employee relationship) entered into by a Federal Government prime contractor or subcontractor calling for supplies or services required for performance of the contract or subcontract.

* * * *

(d) * * *

(2) * * *

(i) Total dollars planned to be subcontracted for individual plans; or the offeror's total projected sales, expressed in dollars, and the total value of projected subcontracts to support the sales for commercial plans;

* * * *

(10) Assurances that the offeror will (i) cooperate in any studies or surveys as may be required, (ii) submit periodic reports so that the Government can determine the extent of compliance by the offeror with the subcontracting plan, and (iii) submit Standard Form (SF) 294, Subcontracting Report for Individual Contracts, and SF 295, Summary Subcontract Report, following the instructions on the forms or as provided in agency regulations; and (iv) ensure that its subcontractors agree to submit SF's 294 and 295.

(11) A description of the types of records that will be maintained concerning procedures that have been adopted to comply with the requirements and goals in the plan, including establishing source lists; and a description of the offeror's efforts to locate small, small disadvantaged and women-owned small business concerns and to award subcontracts to them. * * *

* * * *

(vi) * * * Contractors having commercial plans need not comply with this requirement.

* * * *

(f) A master plan on a plant or division-wide basis which contains all the elements required by paragraph (d) of this clause, except goals, may be incorporated by reference as a part of the subcontracting plan required of the offeror by this clause; provided, * * *

(g) A commercial plan is the preferred type of subcontracting plan for contractors furnishing commercial items (see paragraph (b) of this clause). The commercial

plan shall relate to the offeror's planned subcontracting generally, for both commercial and Government business, rather than solely to the Government contract.

* * * * *

(End of clause)

* * * * *

13. Section 52.219-16 is amended—

(a) By revising the clause date;

(b) In the first sentence of paragraph (b) by removing the word "product"; by adding a sentence at the beginning of (b); and by revising the last sentence;

(c) In (c) at the end of the first sentence, before the period, by adding "and to discuss the matter"; and

(d) By revising (d) to read as follows:

52.219-16 Liquidated Damages—Subcontracting Plan.

* * * * *

LIQUIDATED DAMAGES—SUBCONTRACTING PLAN (XXX 1997)

* * * * *

(b) Performance shall be measured by applying the percentage goals to the total actual subcontracting dollars or, if a commercial plan is involved, to the pro rata share of actual subcontracting dollars attributable to Government contracts covered by the commercial plan. * * * The amount of probable damages attributable to the Contractor's failure to comply, shall be an amount equal to the actual dollar amount by which the Contractor failed to achieve each subcontract goal.

* * * * *

(d) With respect to commercial plans, the Contracting Officer who approved the plan will perform the functions of

the Contracting Officer under this clause on behalf of all agencies with contracts covered by the commercial plan.

* * * * *

(End of clause)

PART 53—FORMS

14. Section 53.301-294 is revised to read as follows:

**53.301-294 Standard Form 294, Subcontracting Report
for Individual Contracts.**

**[INSERT SF 294 HERE]
[Reduce to fit under heading]**

SUBCONTRACTING REPORT FOR INDIVIDUAL CONTRACTS
(See instructions on reverse)

OMB No.: 9000-0006
Expires: 03/31/98

Public reporting burden for this collection of information is estimated to average 3 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the FAR Secretariat (MVR), Federal Acquisition Policy Division, GSA, Washington, DC 20405.

1. CORPORATION, COMPANY OR SUBDIVISION COVERED			3. DATE SUBMITTED										
a. COMPANY NAME			4. REPORTING PERIOD FROM INCEPTION OF CONTRACT THRU: <table border="1" style="width:100%"><tr><td><input type="checkbox"/> MAR 31</td><td><input type="checkbox"/> SEPT 30</td><td>YEAR</td></tr></table>		<input type="checkbox"/> MAR 31	<input type="checkbox"/> SEPT 30	YEAR						
<input type="checkbox"/> MAR 31	<input type="checkbox"/> SEPT 30	YEAR											
b. STREET ADDRESS													
c. CITY	d. STATE	e. ZIP CODE											
2. CONTRACTOR IDENTIFICATION NUMBER			5. TYPE OF REPORT <input type="checkbox"/> REGULAR <input type="checkbox"/> FINAL <input type="checkbox"/> REVISED										
6. ADMINISTERING ACTIVITY (Please check applicable box)													
<table border="0" style="width:100%"><tr><td><input type="checkbox"/> ARMY</td><td><input type="checkbox"/> GSA</td><td><input type="checkbox"/> NASA</td></tr><tr><td><input type="checkbox"/> NAVY</td><td><input type="checkbox"/> DOE</td><td><input type="checkbox"/> OTHER FEDERAL AGENCY (Specify)</td></tr><tr><td><input type="checkbox"/> AIR FORCE</td><td><input type="checkbox"/> DEFENSE LOGISTICS AGENCY</td><td></td></tr></table>					<input type="checkbox"/> ARMY	<input type="checkbox"/> GSA	<input type="checkbox"/> NASA	<input type="checkbox"/> NAVY	<input type="checkbox"/> DOE	<input type="checkbox"/> OTHER FEDERAL AGENCY (Specify)	<input type="checkbox"/> AIR FORCE	<input type="checkbox"/> DEFENSE LOGISTICS AGENCY	
<input type="checkbox"/> ARMY	<input type="checkbox"/> GSA	<input type="checkbox"/> NASA											
<input type="checkbox"/> NAVY	<input type="checkbox"/> DOE	<input type="checkbox"/> OTHER FEDERAL AGENCY (Specify)											
<input type="checkbox"/> AIR FORCE	<input type="checkbox"/> DEFENSE LOGISTICS AGENCY												
7. REPORT SUBMITTED AS (Check one and provide appropriate number)			8. AGENCY OR CONTRACTOR AWARDED CONTRACT										
<input type="checkbox"/> PRIME CONTRACTOR			a. AGENCY'S OR CONTRACTOR'S NAME										
<input type="checkbox"/> SUBCONTRACTOR			b. STREET ADDRESS										
9. DOLLARS AND PERCENTAGES IN THE FOLLOWING BLOCKS: <input type="checkbox"/> DO INCLUDE INDIRECT COSTS <input type="checkbox"/> DO NOT INCLUDE INDIRECT COSTS			c. CITY	d. STATE e. ZIP CODE									

SUBCONTRACT AWARDS

TYPE	CURRENT GOAL		ACTUAL CUMULATIVE	
	WHOLE DOLLARS	PERCENT	WHOLE DOLLARS	PERCENT
10a. SMALL BUSINESS CONCERNS (Include SDB, WOSB, HBCU/MI) (Dollar Amount and Percent of 10c.)				
10b. LARGE BUSINESS CONCERNS (Dollar Amount and Percent of 10c.)				
10c. TOTAL (Sum of 10a and 10b.)		100.0%		100.0%
11. SMALL DISADVANTAGED (SDB) CONCERNS (Include HBCU/MI) (Dollar Amount and Percent of 10c.)				
12. WOMEN-OWNED SMALL BUSINESS (WOSB) CONCERNS (Dollar Amount and Percent of 10c.)				
13. REMARKS				

14a. NAME OF INDIVIDUAL ADMINISTERING SUBCONTRACTING PLAN	14b. TELEPHONE NUMBER	
	AREA CODE	NUMBER

GENERAL INSTRUCTIONS

1. This report is not required from small businesses.

2. This report is not required for commercial items for which a company-wide annual plan (i.e., a Commercial Plan) has been approved, nor from large businesses in the Department of Defense (DOD) Test Program for Negotiation of Comprehensive Subcontracting Plans. The Summary Subcontract Report (SF 295) is required for contractors operating under one of these two conditions and should be submitted to the Government in accordance with the instructions on that form.

3. This form collects subcontract award data from prime contractors/subcontractors that: (a) hold one or more contracts over \$500,000 (over \$1,000,000 for construction of a public facility); and (b) are required to report subcontracts awarded to Small Business (SB), Small Disadvantaged Business (SDB), and Women-Owned Small Business (WOSB) concerns under a subcontracting plan. For the Department of Defense (DOD), the National Aeronautics and Space Administration (NASA), and the Coast Guard, this form also collects subcontract award data for Historically Black Colleges and Universities (HBCUs) and Minority Institutions (MIs).

4. This report is required for each contract containing a subcontracting plan and must be submitted to the administrative contracting officer (ACO) or contracting officer if no ACO is assigned, semi-annually during contract performance for the periods ended March 31st and September 30th. A separate report is required for each contract at contract completion. Reports are due 30 days after the close of each reporting period unless otherwise directed by the contracting officer. Reports are required when due, regardless of whether there has been any subcontracting activity since the inception of the contract or since the previous report.

5. Only subcontracts involving performance within the U.S., its possessions, Puerto Rico, and the Trust Territory of the Pacific Islands should be included in this report.

6. Purchases from a corporation, company, or subdivision that is an affiliate of the prime/subcontractor are not included in this report.

7. Subcontract award data reported on this form by prime contractors/subcontractors shall be limited to awards made to their immediate subcontractors. Credit cannot be taken for awards made to lower tier subcontractors.

SPECIFIC INSTRUCTIONS

BLOCK 2: For the Contractor Identification Number, enter the nine-digit Data Universal Numbering System (DUNS) number that identifies the specific contractor establishment. If there is no DUNS number available that identifies the exact name and address entered in Block 1, contact Dun and Bradstreet Information Services at 1-800-333-0505 to get one free of charge over the telephone. Be prepared to provide the following information: (1) Company name; (2) Company address; (3) Company telephone number; (4) Line of business; (5) Chief executive officer/key manager; (6) Date the company was started; (7) Number of people employed by the company; and (8) Company affiliation.

BLOCK 4: Check only one. Note that all subcontract award data reported on this form represents activity since the inception of the contract through the date indicated in this block.

BLOCK 5: Check whether this report is a "Regular," "Final," and/or "Revised" report. A "Final" report should be checked only if the contractor has completed the contract or subcontract reported in Block 7. A "Revised" report is a change to a report previously submitted for the same period.

BLOCK 6: Identify the department or agency administering the majority of subcontracting plans.

BLOCK 7: Indicate whether the reporting contractor is submitting this report as a prime contractor or subcontractor and the prime contract or subcontract number.

BLOCK 8: Enter the name and address of the Federal department or agency awarding the contract or the prime contractor awarding the subcontract.

BLOCK 9: Check the appropriate block to indicate whether indirect costs are included in the dollar amounts in blocks 10a through 12. To ensure comparability between the goal and actual columns, the contractor may include indirect costs in the actual column only if the subcontracting plan included indirect costs in the goal.

BLOCKS 10a through 12: Under "Current Goal," enter the dollar and percent goals in each category (SB, SDB, and WOSB) from the sub-

contracting plan approved for this contract. (If the original goals agreed upon at contract award have been revised as a result of contract modifications, enter the original goals in Block 13. The amounts entered in Blocks 10a through 12 should reflect the revised goals.) Under "Actual Cumulative," enter actual subcontract achievements (dollar and percent) from the inception of the contract through the date of the report shown in Block 4. In cases where indirect costs are included, the amounts should include both direct awards and an appropriate prorated portion of indirect awards.

BLOCK 10a: Report all subcontracts awarded to SBs including subcontracts to SDBs and WOSBs. For DOD, NASA, and Coast Guard contracts, include subcontracting awards to HBCUs and MIs.

BLOCK 10b: Report all subcontracts awarded to large businesses (LBs).

BLOCK 10c: Report on this line the total of all subcontracts awarded under this contract (the sum of lines 10a and 10b).

BLOCKS 11 and 12: Each of these items is a subcategory of Block 10a. Note that in some cases the same dollars may be reported in both Block 11 and Block 12 (i.e., SDBs owned by women).

BLOCK 11: Report all subcontracts awarded to SDBs (including women-owned SDBs). For DOD, NASA, and Coast Guard contracts, include subcontract awards to HBCUs and MIs.

BLOCK 12: Report all subcontracts awarded to Women-Owned firms (including SDBs owned by women).

BLOCK 13: Enter a short narrative explanation if (a) SB, SDB, or WOSB accomplishments fall below that which would be expected using a straight-line projection of goals through the period of contract performance; or (b) if this is a final report, any one of the three goals was not met.

SPECIAL INSTRUCTIONS FOR COMMERCIAL PLANS

DEFINITIONS

1. Commercial item means a product or service that satisfies the definition of commercial item in Section 2.101 of the Federal Acquisition Regulation.

2. Commercial plan means a subcontracting plan that covers the offeror's fiscal year and that applies to the entire production of commercial items sold by either the entire company or a portion thereof (e.g., division, plant, or product line).

3. Subcontract means a contract, purchase order, amendment, or other legal obligation executed by the prime contractor/subcontractor calling for supplies or services required for the performance of the original contract or subcontract.

4. Direct Subcontract Awards are those that are identified with the performance of one or more specific Government contract(s).

5. Indirect costs are those which, because of incurrence for common or joint purposes, are not identified with specific Government contracts; these awards are related to Government contract performance but remain for allocation after direct awards have been determined and identified to specific Government contracts.

DISTRIBUTION OF THIS REPORT

For the Awarding Agency or Contractor:

The original copy of this report should be provided to the contracting officer at the agency or contractor identified in Block 8. For contracts with DOD, a copy should also be provided to the Defense Logistics Agency (DLA) at the cognizant Defense Contract Management Area Operations (DCMAO) office.

For the Small Business Administration (SBA):

A copy of this report must be provided to the cognizant Commercial Market Representative (CMR) at the time of a compliance review. It is NOT necessary to mail the SF 294 to SBA unless specifically requested by the CMR.

15. Section 53.301-295 is revised to read as follows:

53.301-295 Standard Form 295, Subcontract Report.

**[INSERT SF 295 HERE]
[Reduce to fit under heading]**

[BILLING CODE 6820-EP]


SUMMARY SUBCONTRACT REPORT
(See instructions on reverse)

OMB No.: 9000-0007
Expires: 03/31/98

Public reporting burden for this collection of information is estimated to average 13 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the FAR Secretariat (MVR), Federal Acquisition Policy Division, GSA, Washington, DC 20405.

1. CORPORATION, COMPANY OR SUBDIVISION COVERED			3. DATE SUBMITTED				
a. COMPANY NAME			4. REPORTING PERIOD: <table border="1"><tr><td><input type="checkbox"/> OCT 1 - MAR 31</td><td><input type="checkbox"/> OCT 1 - SEPT 30</td><td>YEAR</td></tr></table>		<input type="checkbox"/> OCT 1 - MAR 31	<input type="checkbox"/> OCT 1 - SEPT 30	YEAR
<input type="checkbox"/> OCT 1 - MAR 31	<input type="checkbox"/> OCT 1 - SEPT 30	YEAR					
b. STREET ADDRESS							
c. CITY	d. STATE	e. ZIP CODE					
2. CONTRACTOR IDENTIFICATION NUMBER			5. TYPE OF REPORT <input type="checkbox"/> REGULAR <input type="checkbox"/> FINAL <input type="checkbox"/> REVISED				

6. ADMINISTERING ACTIVITY <i>(Please check applicable box)</i>		
<input type="checkbox"/> ARMY	<input type="checkbox"/> DEFENSE LOGISTICS AGENCY	<input type="checkbox"/> DOE
<input type="checkbox"/> NAVY	<input type="checkbox"/> NASA	<input type="checkbox"/> OTHER FEDERAL AGENCY <i>(Specify)</i>
<input type="checkbox"/> AIR FORCE	<input type="checkbox"/> GSA	

7. REPORT SUBMITTED AS <i>(Check one)</i>		8. TYPE OF PLAN	
<input type="checkbox"/> PRIME CONTRACTOR	<input type="checkbox"/> BOTH	<input type="checkbox"/> INDIVIDUAL	<input type="checkbox"/> COMMERCIAL
<input type="checkbox"/> SUBCONTRACTOR	IF PLAN IS A COMMERCIAL PLAN, SPECIFY THE PERCENTAGE OF THE DOLLARS ON THIS REPORT ATTRIBUTABLE TO THIS AGENCY. 		

9. CONTRACTOR'S MAJOR PRODUCTS OR SERVICE LINES			
a		c	
b		d	

CUMULATIVE FISCAL YEAR SUBCONTRACT AWARDS
(Report cumulative figures for reporting period in Block 4)

TYPE	WHOLE DOLLARS	PERCENT (To nearest tenth of a %)
10a. SMALL BUSINESS CONCERNS <i>(Include SDB, WOSB, HBCU/MI)</i> <i>(Dollar Amount and Percent of 10c.)</i>		
10b. LARGE BUSINESS CONCERNS <i>(Dollar Amount and Percent of 10c.)</i>		
10c. TOTAL <i>(Sum of 10a and 10b.)</i>		
11. SMALL DISADVANTAGED (SDB) CONCERNS <i>(Dollar Amount and Percent of 10c.)</i>		
12. WOMEN-OWNED SMALL BUSINESS (WOSB) CONCERNS <i>(Dollar Amount and Percent of 10c.)</i>		
13. HISTORICALLY BLACK COLLEGES AND UNIVERSITIES (HBCU) AND MINORITY INSTITUTIONS (MI) <i>(If applicable) (Dollar Amount and Percent of 10c.)</i>		
14. REMARKS		

15. CONTRACTOR'S OFFICIAL WHO ADMINISTERS SUBCONTRACTING PROGRAM		
a. NAME	b. TITLE	c. TELEPHONE NUMBER
		AREA CODE NUMBER

16. CHIEF EXECUTIVE OFFICER	
a. NAME	c. SIGNATURE
b. TITLE	d. DATE

GENERAL INSTRUCTIONS

1. This report is not required from small businesses.
2. This form collects subcontract award data from prime contractors/subcontractors that: (a) hold one or more contracts over \$500,000 (over \$1,000,000 for construction of a public facility); and (b) are required to report subcontracts awarded to Small Business (SB), Small Disadvantaged Business (SDB), and Women-Owned Small Business (WOSB) concerns under a subcontracting plan. For the Department of Defense (DOD), the National Aeronautics and Space Administration (NASA), and the Coast Guard, this form also collects subcontract award data for Historically Black Colleges and Universities (HBCUs) and Minority Institutions (MIs).
3. This report must be submitted semi-annually (for the six months ended March 31st and the twelve months ended September 30th) for contracts with the Department of Defense (DOD) and annually (for the twelve months ended September 30th) for contracts with civilian agencies, except for contracts covered by an approved Commercial Plan (see special instructions in right-hand column). Reports are due 30 days after the close of each reporting period.
4. This report may be submitted on a corporate, company, or subdivision (e.g., plant or division operating on a separate profit center) basis, unless otherwise directed by the agency awarding the contract.
5. If a prime contractor/subcontractor is performing work for more than one Federal agency, a separate report shall be submitted to each agency covering only that agency's contracts, provided at least one of that agency's contracts is over \$500,000 (over \$1,000,000 for construction of a public facility) and contains a subcontracting plan. (Note that DOD is considered to be a single agency; see next instruction.)
6. For DOD, a consolidated report should be submitted for all contracts awarded by military departments/agencies and/or subcontracts awarded by DOD prime contractors. However, DOD contractors involved in construction and related maintenance and repair must submit a separate report for each DOD component.
7. Only subcontracts involving performance within the U.S., its possessions, Puerto Rico, and the Trust Territory of the Pacific Islands should be included in this report.
8. Purchases from a corporation, company, or subdivision that is an affiliate of the prime/subcontractor are not included in this report.
9. Subcontract award data reported on this form by prime contractors/subcontractors shall be limited to awards made to their immediate subcontractors. Credit cannot be taken for awards made to lower tier subcontractors.
10. See special instructions in right-hand column for Commercial Plans.

SPECIFIC INSTRUCTIONS

BLOCK 2: For the Contractor Identification Number, enter the nine-digit Data Universal Numbering System (DUNS) number that identifies the specific contractor establishment. If there is no DUNS number available that identifies the exact name and address entered in Block 1, contact Dun and Bradstreet Information Services at 1-800-333-0505 to get one free of charge over the telephone. Be prepared to provide the following information: (1) Company name; (2) Company address; (3) Company telephone number; (4) Line of business; (5) Chief executive officer/key manager; (6) Date the company was started; (7) Number of people employed by the company; and (8) Company affiliation.

BLOCK 4: Check only one. Note that March 31 represents the six months from October 1st and that September 30th represents the twelve months from October 1st. Enter the year of the reporting period.

BLOCK 5: Check whether this report is a "Regular," "Final," and/or "Revised" report. A "Final" report should be checked only if the contractor has completed all the contracts containing subcontracting plans awarded by the agency to which it is reporting. A "Revised" report is a change to a report previously submitted for the same period.

BLOCK 6: Identify the department or agency administering the majority of subcontracting plans.

BLOCK 7: This report encompasses all contracts with the Federal Government for the agency to which it is submitted, including subcontracts received from other large businesses that have contracts with the same agency. Indicate in this block whether the contractor is a prime contractor, subcontractor, or both (check only one).

BLOCK 8: Check only one. Check "Commercial Plan" only if this report is under an approved Commercial Plan. For a Commercial Plan, the contractor must specify the percentage of dollars in Blocks 10a through 13 attributable to the agency to which this report is being submitted.

BLOCK 9: Identify the major product or service lines of the reporting organization.

BLOCKS 10a through 13: These entries should include all subcontract awards resulting from contracts or subcontracts, regardless of dollar amount, received from the agency to which this report is submitted. If reporting as a subcontractor, report all subcontracts awarded under prime contracts. Amounts should include both direct awards and an appropriate prorated portion of indirect awards. (The indirect portion is based on the percentage of work being performed for the organization to which the report is being submitted in relation to other work being performed by the prime contractor/subcontractor.) Do not include awards made in support of commercial business unless "Commercial" is checked in Block 8 (see Special Instructions for Commercial Plans in right hand column).

Report only those dollars subcontracted this fiscal year for the period indicated in Block 4.

BLOCK 10a: Report all subcontracts awarded to SBs including subcontracts to SDBs and WOSBs. For DOD, NASA, and Coast Guard contracts, include subcontracting awards to HBCUs and MIs.

BLOCK 10b: Report all subcontracts awarded to large businesses (LBs).

BLOCK 10c: Report on this line the grand total of all subcontracts (the sum of lines 10a and 10b).

BLOCKS 11 and 13: Each of these items is a subcategory of Block 10a. Note that in some cases the same dollars may be reported on both Block 11 and Block 12 (i.e., SDBs owned by women); likewise subcontracts to HBCUs or MIs should be reported on both Block 11 and 13.

BLOCK 11: Report all subcontracts awarded to SDBs (including women-owned SDBs). For DOD, NASA, and Coast Guard contracts, include subcontract awards to HBCUs and MIs.

BLOCK 12: Report all subcontracts awarded to Women-Owned Small Business firms (including SDBs owned by women).

BLOCK 13 (For contracts with DOD, NASA, and Coast Guard): Enter the dollar value of all subcontracts with HBCUs/MIs.

SPECIAL INSTRUCTIONS FOR COMMERCIAL PLANS

1. This report is due on October 30th each year for the previous fiscal year ended September 30th.
2. The annual report submitted by reporting organizations that have an approved company-wide annual subcontracting plan for commercial items shall include all subcontracting activity under commercial plans in effect during the year and shall be submitted in addition to the required reports for other-than-commercial items, if any.
3. Enter in Blocks 10a through 13 the total of all subcontract awards under the contractor's Commercial Plan. Show in Block 8 the percentage of this total that is attributable to the agency to which this report is being submitted. This report must be submitted to each agency from which contracts for commercial products covered by an approved Commercial Plan were received.

DEFINITIONS

1. Commercial item means a product or service that satisfies the definition of commercial item in Section 2.101 of the Federal Acquisition Regulation.
2. Commercial plan means a subcontracting plan that covers the offeror's fiscal year and that applies to the entire production of commercial items sold by either the entire company or a portion thereof (e.g., division, plant, or product line).
3. Subcontract means a contract, purchase order, amendment, or other legal obligation executed by the prime contractor/subcontractor calling for supplies or services required for the performance of the original contract or subcontract.
4. Direct Subcontract Awards are those that are identified with the performance of one or more specific Government contract(s).
5. Indirect Subcontract Awards are those which, because of incurrence for common or joint purposes, are not identified with specific Government contracts; these awards are related to Government contract performance but remain for allocation after direct awards have been determined and identified to specific Government contracts.

SUBMITTAL ADDRESSES FOR ORIGINAL REPORT

For DOD Contractors, send reports to the cognizant contract administration office as stated in the contract.

For Civilian Agency Contractors, send reports to awarding agency:

1. NASA: Forward reports to NASA, Office of Procurement (HC), Washington, DC 20546
2. OTHER FEDERAL DEPARTMENTS OR AGENCIES: Forward report to the OSD/BU Director unless otherwise provided for in instructions by the Department or Agency.

FOR ALL CONTRACTORS:

SMALL BUSINESS ADMINISTRATION (SBA): Send "info copy" to the cognizant Commercial Market Representative (CMR) at the address provided by SBA. Call SBA Headquarters in Washington, DC at (202) 205-6475 for correct address if unknown.

March 7, 1997

Mr. Peter Weiss
Office of Information and Regulatory Affairs
Office of Management and Budget
Docket Library, Room 10102
725 17th Street, NW
Washington, DC 20503

Dear Mr. Weiss:

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration have agreed to publish FAR case 97-300, Liquidated Damages, as a proposed rule. Enclosed are three copies of the draft rule for your review. This rule has been identified as "not significant."

If you have any questions regarding this rule, I can be reached at (202) 501-0692.

Sincerely,

BEVERLY FAYSON
FAR Secretariat
Federal Acquisition Policy Division

Enclosures




General Services Administration
Office of Acquisition Policy
Washington, DC 20405

January 30, 1997

MEMORANDUM FOR THE FAR SECRETARIAT

ATTN: ROD LANTIER

FROM: JERRY OLSON 
ACTING CHAIRMAN
CIVILIAN AGENCY
ACQUISITION COUNCIL (CAAC)

SUBJECT: FAR Case 89-42, Liquidated Damages

Please change the case number to FAR Case 97-300 for the proposed rule submitted to the FAR Secretariat on December 4, 1996. Also, initiate a new case file and insert into the file the memorandum from the DAR Council dated November 21, 1995.

FAR Case 89-42 will remain in existence to identify the interim rule that is currently in the FAR.

When the proposed rule is published as a final rule, an explanation will be included in the Federal Register that FAR Case 89-42 is also made final by FAR Case 97-300.





General Services Administration
Office of Acquisition Policy
Washington, DC 20405

JAN 21 1987

MEMORANDUM FOR THE FAR SECRETARIAT

FROM: JERRY OLSON
ACTING CHAIRMAN
CIVILIAN AGENCY
ACQUISITION COUNCIL (CAAC)

SUBJECT: FAR Case 89-42, Liquidated Damages

Enclosed is the aforementioned case, which is being forwarded to the FAR Secretariat for publication as a proposed rule. The rule proposes amending Federal Acquisition Regulation (FAR) 11.501, Subpart 19.7, 52.219-9, and 52.219-16. This package updates/replaces the two previous packages dated December 4, 1996 and January 10, 1997, that were previously forwarded to the FAR Secretariat. Additional changes to the coverage, Federal Register Notice, and forms have made this revision necessary.

Previously, an interim rule was published on July 21, 1989 (54 FR 30708), to require a prime contractor to pay liquidated damages upon a finding of lack of good faith effort to meet its small business subcontracting goals. The rule implemented Section 304 of the Business Opportunity Development Reform Act of 1988, Pub. L. 100-656. Significant revisions to the interim rule were proposed based on an analysis of public comments. The case has now been further revised to implement OFPP Policy Letter 95-1, Subcontracting Plans for companies Supplying Commercial Items," and the draft policy letter on "Subcontracting Plans."

On November 21, 1995, the DAR Council approved the case as a proposed rule. On October 9, 1996, the CAAC approved the case as a proposed rule.

The following are enclosed for your information:

- a. Proposed rule/forms updated through FAC 90-45 (Atch. 1).
- b. Collateral requirements (Atch. 2).
- c. DAR Case of November 21, 1995 (Atch. 3).



Rec'd 1-28-97
WPK

d. Request for OMB clearance (Atch. 4).

This rule shall not be published until specific approval is obtained from the Director or Acting Director. Subject to this approval, please arrange to publish this proposed rule in the Federal Register.

Questions relating to this case may be referred to Ms. Linda Klein on (202) 501-3775.

Attachments

cc: Director, DAR Council

According to Linda
Klein 1-29-97 this
will be assigned
a new Case #
(97-300) and
89-042 will be
withdrawn at the
appropriate time.

So Collaterals
will Change.
She will send
us a memo.
Week - 1-30-97

FAR Case 89-042

Proposed Rule Federal Register Notice

ACTION: Proposed rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council are proposing to amend the Federal Acquisition Regulation (FAR) Parts 19, 52, and 53 to clarify policy on liquidated damages and commercial subcontracting plans and implement OFPP Policy Letter 95-1, Subcontracting Plans for Companies Supplying Commercial Items.

SUPPLEMENTARY INFORMATION:

A. Background

An interim rule was published on July 21, 1989 (54 FR 30708), to require a prime contractor to pay liquidated damages upon a finding of lack of good faith efforts to meet its small business subcontracting goals. This rule implemented Section 304 of the Business Opportunity Development Reform Act of 1988, Pub. L. 100-656.

Significant revisions to the interim rule were proposed based on analysis of public comments. Extensive discussions took place regarding long-standing problems of trying to extend and adapt the requirement of Section 8(d) of the Small Business Act to contracts for commercial products, now compounded by the introduction of liquidated damages. To resolve those problems, the case has been held pending release and conformance to the FAC 90-32, published on September 18, 1995 (60 FR 48231); "Acquisition of Commercial Items," and the OFPP Policy Letter 95-1, "Subcontracting Plans for Companies Supplying Commercial Items."

B. Regulatory Flexibility Act

The proposed rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because small businesses are exempt from subcontracting plan requirements per FAR 19.702(b).

C. Paperwork Reduction Act

The Paperwork Reduction Act applies. The rule, in part, adds additional requirements that the subcontracting plan shall include. Therefore, a revised burden estimate

for OMB Clearance 9000-0006 has been submitted to OMB for review and approval

January 14, 1997 (revised)

Baseline FAR through FAC 90-45

Subpart 11.5--LIQUIDATED DAMAGES

11.501 General.

This subpart provides policies and procedures for the use of liquidated damages clauses in solicitations and contracts for supplies, services, and construction [, **except for the Liquidated Damages--Subcontracting Plan clause at 52.219-16, which may be applied pursuant to 19.705-7**].

* * * * *

SUBPART 19.7--SUBCONTRACTING WITH SMALL BUSINESS, SMALL DISADVANTAGED BUSINESS AND WOMEN-OWNED SMALL BUSINESS CONCERNS

19.701 Definitions.

[**"Commercial plan," as used in this subpart, means a subcontracting plan that covers the offeror's fiscal year and that applies to the entire production of commercial items sold by either the entire company or a portion thereof (e.g., division, plant, or product line).**]

"Failure to make a good faith effort to comply with the subcontracting plan," as used in this subpart, means willful or intentional failure to perform in accordance with the requirements of the subcontracting plan, or willful or intentional action to frustrate the plan.

[**"Individual contract plan," as used in this subpart, means a subcontracting plan that covers the entire contract period (including option periods), applies to a specific contract, and has goals that are based on the offeror's planned subcontracting in support of the specific contract, except**

that indirect costs incurred for common or joint purposes may be allocated on a prorated basis to the contract.]

["Master plan," as used in this subpart, means a subcontracting plan that contains all of the required elements, except goals, and may be incorporated into individual contract plans, provided the master plan has been approved.]

"Small business subcontractor" means any concern that--

(a) In connection with subcontracts of \$10,000 or less if, including its affiliates, its number of employees does not exceed 500 persons; and

(b) In connection with subcontracts exceeding \$10,000, if its number of employees or average annual receipts, including its affiliates, does not exceed the size standard under section 19.102 for the product or service it is providing on the subcontract.

"Subcontract," as used in this subpart, means any agreement (other than one involving an employer-employee relationship) entered into by a Government prime contractor or subcontractor calling for supplies and/or services required for contract performance, contract modification, or subcontract.

19.702 Statutory requirements.

Any contractor receiving a contract for more than the simplified acquisition threshold shall agree in the contract that small business concerns, small disadvantaged business concerns and women-owned small business concerns shall have the maximum practicable opportunity to participate in contract performance consistent with its efficient performance. It is further the policy of the United States that its prime contractors establish procedures to ensure the timely payment of amounts due pursuant to the terms of their subcontracts with small business concerns, small disadvantaged business concerns and women-owned small business concerns.

(a) Except as stated in paragraph (b) of this section, **[Section 8d of]** the Small Business Act **[(15 U.S.C. 637(d)]** imposes the following requirements regarding subcontracting with small businesses and small business subcontracting plans.

(1) In negotiated acquisitions, each solicitation of offers to perform a contract or contract modification, which individually is expected to exceed \$500,000 (\$1,000,000 for construction) and that has subcontracting possibilities shall require the apparently successful offeror to submit an acceptable subcontracting plan. If the apparently successful offeror fails to negotiate a subcontracting plan acceptable to the contracting officer within the time limit prescribed by the contracting officer, the offeror will be ineligible for award.

(2) In sealed bidding acquisitions, each invitation for bids to perform a contract or contract modification, which individually is expected to exceed \$500,000 (\$1,000,000 for construction) and that has subcontracting possibilities, shall require the bidder selected for award to submit a subcontracting plan. If the selected bidder fails to submit a plan within the time limit prescribed by the contracting officer, the bidder will be ineligible for award.

(b) Subcontracting plans (see subparagraphs (a)(1) and (2) of this section) are not required--

(1) From small business concerns;

(2) For personal services contracts;

(3) For contracts or contract modifications that will be performed entirely outside of any State, territory, or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico; or

(4) For modifications to contracts that do not contain the clause at 52.219-8, Utilization of Small, Small Disadvantaged and Women-Owned Small Business Concerns ~~(or equivalent prior clauses)~~ [(or

equivalent prior DAR, FPR, or NASA clauses); e.g., contracts awarded before Pub. L. 95-507 and that are within the scope of the contract].

(c) As stated in 15 U.S.C. 637(d)(8), any contractor or subcontractor failing to comply in good faith with the requirements of the subcontracting plan is in material breach of its contract. Further, 15 U.S.C. 637(d)(4)(F) directs that a contractor's failure to make a good faith effort to comply with the requirements of the subcontracting plan shall result in the imposition of liquidated damages.

(d) ***However, the Mentor-Protege agreement must have been approved by the Office of Small and Disadvantaged Business Utilization, Office of the Deputy Under Secretary of Defense (International and Commercial Programs) DUSD(I&CP)SADBU, Room 2A338, 3061 Defense Pentagon, Washington, DC 20301-3061, (703) 697-9383, before developmental assistance costs may be credited against subcontract goals.

19.703 Eligibility requirements for participating in the program.

(a) To be eligible as a subcontractor under the program, a concern must represent itself as a small business concern, small disadvantaged business concern or a women-owned small business concern.

(1) To represent itself as a small business concern or a women-owned small business concern, a concern must meet the appropriate definition in 19.001.

(2) To represent itself as a small disadvantaged business concern, a concern must meet the definition in 19.001. Individuals who represent that they are members of named groups (Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent-Asian Americans) may also represent themselves as socially and economically disadvantaged. Individuals who are not members of named groups may also represent themselves, and participate in the program, as socially and economically disadvantaged if they are qualified by the SBA under the procedures in 13 CFR 124.105(c)). Concerns that are tribally-owned entities or Native Hawaiian Organizations may represent

themselves as socially and economically disadvantaged if they qualify under the requirements of 13 CFR 124.112 or 13 CFR 124.113, respectively. The Office of Minority Small Business and Capital Ownership Development in the SBA has the final authority to determine the eligibility of a concern to be designated as a small disadvantaged business concern, and will answer inquiries from contractors and others regarding eligibility. Formal protests of a subcontractor's eligibility as a small disadvantaged business may be initiated only by the contracting officer responsible for the prime contract or by the SBA. Such protests will be processed in accordance with 13 CFR 124.601-124.610. Other small business subcontractors and the prime contractor may submit information to the contracting officer in an effort to persuade the contracting officer to initiate a protest. Such protests, in order to be considered timely, must be received by the contracting officer prior to completion of performance by the intended subcontractor.

(b) A contractor acting in good faith may rely on the written representation of its subcontractor regarding the subcontractor's status **[as either a small business concern, a small disadvantaged business concern or a women-owned small business concern]**. The contractor, the contracting officer, or any other interested party can challenge a subcontractor's size status representation by filing a protest, in accordance with 13 CFR 121.1601 through 121.1608. Protests challenging a subcontractor's disadvantaged status representation shall be filed in accordance with 13 CFR 124.601 through 124.610. Protests challenging a subcontractor's status as a women-owned small business concern shall be filed in accordance with Small Business Administration procedures.

19.704 Subcontracting plan requirements.

(a) Each subcontracting plan required under 19.702(a)(1) and (2) must include--

(1) Separate percentage goals for using small business concerns, small disadvantaged business concerns and women-owned small business concerns as subcontractors;

[(2) A statement of total dollars planned to be subcontracted and a statement of the total dollars planned to be subcontracted to small, small disadvantaged and women-owned small business concerns;]

[(3) A description of the principal types of supplies and services to be subcontracted and an identification of the types planned for subcontracting to small, small disadvantaged and women-owned small-business concerns;]

[(4) A description of the method used to develop the subcontracting goals;]

[(5) A description of the method used to identify potential sources for solicitation purposes;]

[(6) A statement as to whether or not the offeror included indirect costs in establishing subcontracting goals, and a description of the method used to determine the proportionate share of indirect costs to be incurred with small, small disadvantaged and women-owned small business concerns;]

(2)[7] The name of an individual employed by the offeror who will administer the offeror's subcontracting program, and a description of the duties of the individual;

(3)[8] A description of the efforts the offeror will make to ensure that small business concerns, small disadvantaged business concerns and women-owned small business concerns **will** have an equitable opportunity to compete for subcontracts;

(4)[9] Assurances that the offeror will include the clause at 52.219-8, Utilization of Small, Small Disadvantaged and Women-Owned Small Business Concerns (see 19.708(b)), in all subcontracts that offer further subcontracting opportunities, and that the offeror will require all subcontractors (except small business concerns) that receive subcontracts in excess of \$500,000 (\$1,000,000 for construction) to adopt a plan similar to the plan required by the clause at 52.219-9, Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan (see 19.708(c));

~~(5)~~**[10]** Assurances that the offeror will (i) cooperate in any studies or surveys as may be required, (ii) submit periodic reports ~~in order to allow~~ **[so that]** the Government ~~to~~ **[can]** determine the extent of compliance by the offeror with the subcontracting plan, (iii) submit Standard Form (SF) 294, Subcontracting Report for Individual Contracts, and SF 295, Summary Subcontract Report, ~~in accordance with~~ **[following]** the instructions on the forms **[or as provided in agency regulations; and** (iv) **ensure that its subcontractors agree to submit SF 294s and SF 295s; and]**

~~(6)~~ **[11]** A ~~recitation~~ **[description]** of the types of records ~~the offeror~~ **[that]** will **[be]** maintain~~ed~~ **[to demonstrate** **[concerning]** procedures adopted to comply with the requirements and goals in the plan, including establishing source lists; and a description of the offeror's efforts to locate small, small disadvantaged and women-owned small business concerns and to award subcontracts to them.

(b) Contractors may establish, on a plant or division-wide basis, a master ~~subcontracting~~ plan **[(see 19.701),]** which contains all the elements required by the clause at 52.219-9, Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan, except goals. Master plans shall be effective for a 3-year period after approval by the contracting officer; however, it is incumbent upon contractors to maintain and update master plans. Changes required to update master plans are not effective until approved by the contracting officer. A master plan, when incorporated in an individual plan, shall apply to that contract throughout the life of the contract.

(c) For **[multiyear contracts or]** contracts containing options, the cumulative value of the basic contract and all options is considered in determining whether a subcontracting plan is necessary (see 19.705-2(a)). If a plan is necessary and the offeror is submitting an individual contract plan, the plan shall contain all the elements required by 19.704(a) and shall contain separate ~~parts~~ **[statements and goals]** ~~one~~ for the basic contract and ~~one~~ for each option.

[(d) Contractors furnishing commercial items may establish a commercial plan (as defined in 19.701) with the approval of the contracting officer. The contractor shall:

(1) Submit the commercial plan to either (i) the first contracting officer awarding a contract subject to the plan during the offeror's fiscal year, or (ii) if the offeror has ongoing contracts with commercial plans, to the contracting officer responsible for the contract with the latest completion date. The contracting officer shall negotiate the commercial plan for the Government. The approved commercial plan shall remain in effect during the offeror's fiscal year for all Government contracts in effect during the period.

(2) Submit a new commercial plan, 30 days before the end of the fiscal year, to the contracting officer responsible for the uncompleted Government contract with the latest completion date. The contractor must provide to each contracting officer responsible for an ongoing contract subject to the plan, the identity of the contracting officer that will be negotiating the new plan. Once the new commercial plan is approved, the contractor shall provide a copy of the approved plan to each contracting officer responsible for an ongoing contract that is subject to the plan.]

19.705 Responsibilities of the contracting officer under the subcontracting assistance program.

19.705-1 General support of the program.

The contracting officer may encourage the development of increased subcontracting opportunities in negotiated acquisition by providing monetary incentives such as payments based on actual subcontracting achievement or award fee contracting (see the clause at 52.219-10, Incentive Subcontracting Program, and 19.708(c)). When using any contractual incentive provision based upon rewarding the contractor monetarily for exceeding goals in the subcontracting plan, the contracting officer must ensure that (a) the goals are realistic and (b) any rewards for exceeding the goals are

commensurate with the efforts the contractor would not have otherwise expended. Incentive provisions should normally be negotiated after reaching final agreement with the contractor on the subcontracting plan.

19.705-2 Determining the need for a subcontracting plan.

The contracting officer shall take the following actions to determine whether a proposed contractual action requires a subcontracting plan:

(a) Determine whether the proposed contractual action will meet the dollar threshold in 19.702(a)(1) or (2). If the action includes options or similar provisions, include their value in determining whether the threshold is met.

(b) Determine whether subcontracting possibilities exist by considering relevant factors such as--

(1) Whether firms engaged in the business of furnishing the types of items to be acquired customarily contract for performance of part of the work or maintain sufficient in-house capability to perform the work: and

(2) Whether there are likely to be product prequalification requirements.

(c) If it is determined that there are no subcontracting possibilities, the determination must be approved at a level above the contracting officer and placed in the contract file.

(d) In solicitations for negotiated acquisitions, the contracting officer may require the submission of subcontracting plans with initial offers, or at any other time prior to award. In determining when subcontracting plans should be required, as well as when and with whom plans should be negotiated, the contracting officer shall consider the integrity of the competitive process, the goal of affording maximum practicable opportunity for small, small disadvantaged and women-owned small business concerns to participate, and the burden placed on offerors.

19.705-3 Preparing the solicitation.

The contracting officer shall provide the Small Business Administration's (SBA's) resident procurement center representative, if any, a reasonable period of time to review any solicitation requiring submission of a subcontracting plan and to submit advisory findings before the solicitation is issued.

19.705-4 Reviewing the subcontracting plan.

The contracting officer shall review the subcontracting plan for adequacy, ensuring that the required information, goals, and assurances are included (see 19.704).

(a) No detailed standards apply to every subcontracting plan. Instead, the contracting officer must consider each plan in terms of the circumstances of the particular acquisition, including--

(1) Previous involvement of small business concerns as prime contractors or subcontractors in similar acquisitions;

(2) Proven methods of involving small business concerns as subcontractors in similar acquisitions; and

(3) The relative success of methods the contractor intends to use to meet the goals and requirements of the plan, as evidenced by records maintained by contractors.

(b) If, under a sealed bid solicitation, a bidder submits a plan that does not cover each of the ~~six~~ [eleven] required elements (see 19.704), the contracting officer shall advise the bidder of the deficiency and request submission of a revised plan by a specific date. If the bidder does not submit a plan which incorporates the ~~six~~ required elements within the time allotted, the bidder shall be ineligible for award. If the plan, although responsive, evidences the bidder's intention not to comply with its obligations under the clause at 52.219-8, Utilization of Small, Small Disadvantaged and Women-Owned Small Business Concerns, the contracting officer may find the bidder nonresponsible.

(c) In negotiated acquisitions, the contracting officer shall determine whether the plan is acceptable based on the negotiation of each of the ~~six~~ [eleven] elements of the plan (see 19.704). Subcontracting

goals should be set at a level that the parties reasonably expect can result from the offeror expending good faith efforts to use small, small disadvantaged and women-owned small business subcontractors to the maximum practicable extent. **[The contracting officer shall take particular care to ensure that the offeror has not submitted unreasonably low goals in order to minimize exposure to liquidated damages and to avoid the administrative burden of substantiating good faith efforts.**

Additionally, ~~P~~[p]articular attention should be paid to the identification of steps that, if taken, would be considered a good faith effort. No goal should be negotiated upward if it is apparent that a higher goal will significantly increase the Government's cost or seriously impede the attainment of acquisition objectives. An incentive subcontracting clause (see 52.219-10, Incentive Subcontracting Program), may be used when additional and unique contract effort, such as providing technical assistance, could significantly increase subcontract awards to small, small disadvantaged or women-owned small businesses.

(d) In determining the acceptability of a proposed subcontracting plan, the contracting officer should take the following actions:

(1) **[Obtain information available from the cognizant administrative contracting office, as provided for in 19.706(a), and** ~~E~~[e]valuate the offeror's past performance in awarding subcontracts for the same or similar products or services to small, small disadvantaged and women-owned small business concerns. If information is not available on a specific type of product or service, evaluate the offeror's overall past performance **[and consider the performance of other contractors on similar efforts].**

(2) In accordance with 15 U.S.C. 637(d)(4)(F)(iii), ensure that the goals offered are attainable in relation to--

(i) The subcontracting opportunities available to the contractor, commensurate with the efficient and economical performance of the contract;

(ii) The pool of eligible subcontractors available to fulfill the subcontracting opportunities; and

(iii) The actual performance of such contractor in fulfilling the subcontracting goals specified in prior plans.

[(3) Ensure that the subcontracting goals are consistent with the offeror's cost and pricing data.]

(3)[4] Evaluate the offeror's make-or-buy policy or program to ensure that it does not conflict with the offeror's proposed subcontracting plan and is in the Government's interest. If the contract involves products or services that are particularly specialized or not generally available in the commercial market, consider the offeror's current capacity to perform the work and the possibility of reduced subcontracting opportunities.

(4)[5] Evaluate subcontracting potential, considering the offeror's make-or-buy policies or programs, the nature of the ~~products~~ **[supplies]** or services to be subcontracted, the known availability of small, small disadvantaged and women-owned small business concerns in the geographical area where the work will be performed[.], ~~and the potential contractor's long-standing contractual relationship with its suppliers.~~

(5)[6] Advise the offeror of available sources of information on potential small, small disadvantaged and women-owned small business subcontractors, as well as any specific concerns known to be potential subcontractors. If the offeror's proposed goals are questionable, the contracting officer shall emphasize that the information should be used to develop realistic and acceptable goals.

(6)[7] Obtain advice and recommendations from the SBA procurement center representative (if any) and the agency small business specialist.

19.705-5 Awards involving subcontracting plans.

(a) In making an award that requires a subcontracting plan, the contracting officer shall be responsible for the following:

(1) Consider the contractor's compliance with the subcontracting plans submitted on previous contracts as a factor in determining contractor responsibility.

(2) Assure that a subcontracting plan was submitted when required.

(3) Notify the SBA resident procurement center representative of the opportunity to review the proposed contract (including the plan and supporting documentation). The notice shall be issued in sufficient time to provide the representative a reasonable time to review the material and submit advisory recommendations to the contracting officer. Failure of the representative to respond in a reasonable period of time shall not delay contract award.

(4) Determine any fee that may be payable if an incentive is used in conjunction with the subcontracting plan.

(5) Ensure that an acceptable plan is incorporated into and made a material part of the contract.

(b) Letter contracts and similar undefinitized instruments, which would otherwise meet the requirements of 19.702(a)(1) and (2), shall contain at least a preliminary basic plan addressing the requirements of 19.704 and in such cases require the negotiation of the final plan within 90 days after award or before definitization, whichever occurs first.

19.705-6 Postaward responsibilities of the contracting officer.

After a contract or contract modification containing a subcontracting plan is awarded, the contracting officer **[who approved the plan]** is responsible for the following:

(a) Notifying the SBA of the award by sending a copy of the award document to the Assistant Regional Administrator for Procurement Assistance in the SBA region where the contract will be performed.

(b) Forwarding a copy of each **[commercial]** plan and any associated approvals to the Assistant Regional Administrator for Procurement Assistance in the SBA region where the contractor's headquarters is located[.],~~if any company wide plans were received from offerors of commercial products.~~

(c) Giving to the assigned SBA resident procurement center representative (if any) a copy of--

(1) Any subcontracting plan submitted in response to a sealed bid solicitation; and

(2) The final negotiated subcontracting plan that was incorporated into a negotiated contract or contract modification.

(d) Notifying the SBA resident procurement center representative of the opportunity to review subcontracting plans in connection with contract modifications.

(e) Forwarding a copy of each plan, or a determination that there is no requirement for a subcontracting plan, to the cognizant contract administration office.

(f) Initiating action to assess liquidated damages in accordance with 19.705-7 upon a recommendation by the administrative contracting officer or receipt of other reliable evidence to indicate that such action is warranted.

(g) Taking action to enforce the terms of the contract upon receipt of a notice under 19.706~~(a)(6)~~

~~[(f)]~~.

19.705-7 Liquidated damages.

(a) Maximum practicable utilization of small, small disadvantaged and women-owned small business concerns as subcontractors in Government contracts is a matter of national interest with both social and economic benefits. When a contractor fails to make a good faith effort to comply with a subcontracting plan, these objectives are not achieved, and 15 U.S.C. 637(d)(4)(F) directs that liquidated damages shall be paid by the contractor.

(b) The amount of damages attributable to the contractor's failure to comply shall be ~~equal to~~ an amount equal [to] the actual dollar amount by which the contractor failed to achieve each subcontract[ing] goal[.] ~~or, in the case of a commercial products plan, shall be that portion of the dollar amount allocable to Government contracts by which the contractor failed to achieve each subcontract goal.~~

(c) If, at completion [of the basic contract or any option], or in the case of a commercial ~~products~~ plan, at the close of the fiscal year for which the plan is applicable, a contractor has failed to meet its subcontracting goals[, the contracting officer shall review all available information for an indication that the contractor has not made a good faith effort to comply with the plan. If no such indication is found, the contracting officer shall document the file accordingly.] ~~and~~ [If] the contracting officer decides in accordance with paragraph (d) of this subsection that the contractor failed to make a good faith effort to comply with its subcontracting plan, the contracting officer shall give the contractor written notice specifying the failure, advising the contractor of the possibility that the contractor may have to pay to the Government liquidated damages, and providing a period of ~~10~~ [15 working] days (or longer period as necessary) within which to respond. The notice shall give the contractor an opportunity to demonstrate what good faith efforts have been made before the contracting officer issues the final decision, and shall further state that failure of the contractor to respond may be taken as an admission that no valid explanation exists. ~~When appropriate, the notice may invite the contractor to discuss the matter.~~

(d) In determining whether a contractor failed to make a good faith effort to comply with its subcontracting plan, a contracting officer must look to the totality of the contractor's actions, consistent with the information and assurances provided in its plan. The fact that the contractor failed to meet its subcontracting goals does not, in and of itself, constitute a failure to make a good faith effort. For

example, notwithstanding a contractor's diligent effort to identify and solicit offers from small, small disadvantaged and women-owned small business concerns, factors such as unavailability of anticipated sources or unreasonable prices may frustrate achievement of the contractor's goals. However, when considered in the context of the contractor's total effort in accordance with its plan, the following [, **though not all inclusive,**] may be considered as ~~indicia~~ **[indicators]** of a failure to make a good faith effort: a failure to attempt to identify, contact, solicit, or consider for contract award small, small disadvantaged or women-owned small business concerns; a failure to designate **[and maintain]** a company official to administer the subcontracting program **[and monitor and enforce compliance with the plan; a failure to submit Standard Form (SF) 294, Subcontracting Report for Individual Contracts, and Standard Form (SF) 295, Summary Subcontract Report, in accordance with instructions on the forms or as provided in agency regulations]**, a failure to maintain records or otherwise demonstrate procedures adopted to comply with the plan; **[and]** the adoption of company policies or procedures which have as their objectives the frustration of the objectives of the plan.

(e) If, after consideration of all the pertinent data, the contracting officer finds that the contractor failed to make a good faith effort to comply with its subcontracting plan, the contracting officer shall issue a final decision to the contractor to that effect and require the payment of liquidated damages in an amount stated. The contracting officer's final decision shall state that the contractor has the right to appeal under the clause in the contract entitled Disputes.

~~(f) With respect to commercial products plans; i.e., company wide or division wide subcontracting plans approved under paragraph (g) of the clause in the contract entitled Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan, the contracting officer of the agency that originally approved the plan will exercise the functions of the contracting~~

~~officer under this subsection on behalf of all agencies that awarded contracts covered by that commercial products plan.~~

[(f) With respect to commercial plans approved under ~~paragraph (f) of the~~ [clause at] 52.219-9, Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan, the contracting officer that approved the plan shall--

(1) Perform the functions of the contracting officer under this subsection on behalf of all agencies with contracts covered by the commercial plan;

(2) Determine whether or not the goals in the commercial plan were achieved and, if they were not achieved, review all available information for an indication that the contractor has not made a good faith effort to comply with the plan, document the results of the review, and provide a copy to the other contracting officers with contracts subject to the commercial plan as listed in the "Remarks" block of the SF 295; and

(3) If a determination is made to assess liquidated damages, request other contracting officers with contracts incorporating the plan to provide the amount of payments made under their Government contracts subject to the plan that contributed to the contractor's total sales during the contractor's fiscal year in order to calculate and assess liquidated damages on the Government's behalf. For example: The contractor's total sales are \$50 million and the subcontracting dollars to support the sales are \$20 million, or 40 percent. The Government's payments under contracts subject to the plan contributing to the contractor's total sales are \$5 million. Therefore, the pro rata share of subcontracting attributable to the Government contracts covered by the plan is 10 percent of \$20 million, or \$2 million. If the contractor failed to achieve its small business goal by 1 percent, the liquidated damages would be calculated as 1 percent of \$2 million. A copy of the contracting officer's final decision assessing liquidated damages shall be

provided to other contracting officers with contracts subject to the commercial plan as listed in the "Remarks" block of the SF 295.

(g) Liquidated damages shall be in addition to any other remedies that the Government may have.

[(h) Every contracting officer with a contract that is subject to a commercial plan shall include in the contract file (i) a copy of the approved plan, (ii) a copy of the determination regarding goal achievement and (if applicable) whether the contractor made a good faith effort to comply with the plan, and (iii) a copy of the final decision assessing liquidating damages, if applicable.]

19.706 Responsibilities of the cognizant administrative contracting officer.

~~(a)~~ The administrative contracting officer is responsible for assisting in evaluating subcontracting plans, and for monitoring, evaluating, and documenting contractor performance under the clause prescribed in 19.708(b) and any subcontracting plan included in the contract. The contract administration office shall provide the necessary information and advice to support the contracting officer, as appropriate, by furnishing--

~~(1)~~ [(a)] Documentation on the contractor's performance and compliance with subcontracting plans under previous contracts;

~~(2)~~ [(b)] Information on the extent to which the contractor is meeting the plan's goals for subcontracting with eligible small, small disadvantaged and women-owned small business concerns;

~~(3)~~ [(c)] Information on whether the contractor's efforts to ensure the participation of small, small disadvantaged and women-owned small business concerns are in accordance with its subcontracting plan;

~~(4)~~ [(d)] Information on whether the contractor is requiring its subcontractors to adopt similar subcontracting plans;

~~(5)~~ [(e)] Immediate notice if, during performance, the contractor is failing to meet its commitments under the clause prescribed in 19.708(b) or the subcontracting plan; ~~and~~

~~(6) [(f)]~~ Immediate notice and rationale if, during performance, the contractor is failing to comply in good faith with the subcontracting plan[; and]

[(g) Immediate notice that performance under a contract is complete, that the goals were or were not met, and, if not met, whether there is any indication of a lack of a good faith effort to comply with the subcontracting plan.]

~~(b) If the contractor does not comply in good faith with the subcontracting plan, the administrative contracting officer shall, upon contract completion, make appropriate recommendations that contracting officers may use for future contracts.~~

19.707 The Small Business Administration's role in carrying out the program.

(a) Under the program, the SBA may--

(1) Assist both Government agencies and contractors in carrying out their responsibilities with regard to subcontracting plans;

(2) Review (within 5 working days) any solicitation that meets the dollar threshold in 19.702(a)(1) or (2) before the solicitation is issued;

(3) Review (within 5 working days) before execution any negotiated contractual document requiring a subcontracting plan, including the plan itself, and submit recommendations to the contracting officer, which shall be advisory in nature; and

(4) Evaluate compliance with subcontracting plans, either on a contract-by-contract basis, or, in the case of contractors having multiple contracts, on an aggregate basis.

(b) The SBA is not authorized to (1) prescribe the extent to which any contractor or subcontractor shall subcontract, (2) specify concerns to which subcontracts will be awarded, or (3) exercise any authority regarding the administration of individual prime contracts or subcontracts.

19.708 Solicitation provisions and contract clauses.

(a) The contracting officer shall insert the clause at 52.219-8, Utilization of Small, Small Disadvantaged and Women-Owned Small Business Concerns, in solicitations and contracts when the contract amount is expected to be over the simplified acquisition threshold unless--

(1) A personal services contract is contemplated (see 37.104); or

(2) The contract, together with all its subcontracts, is to be performed entirely outside of any State, territory, or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

(b)(1) The contracting officer shall, when contracting by negotiation, insert the clause at 52.219-9, Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan, in solicitations and contracts that (i) offer subcontracting possibilities, (ii) are expected to exceed \$500,000 (\$1,000,000 for construction of any public facility), and (iii) are required to include the clause at 52.219-8, Utilization of Small, Small Disadvantaged and Women-Owned Small Business Concerns, unless the acquisition is set aside or is to be accomplished under the 8(a) program. When contracting by sealed bidding rather than by negotiation, the contracting officer shall use the clause with its Alternate I. When contracting by negotiation, and subcontracting plans are required with initial proposals as provided for in 19.705-2(d), the contracting officer shall use the clause with its Alternate II.

(2) The contracting officer shall insert the clause at 52.219-16, Liquidated Damages-- Subcontracting Plan, in all solicitations and contracts containing the clause at 52.219-9, Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan, or **[the clause with]** its Alternate I.

(c)(1) The contracting officer may, when contracting by negotiation, insert in solicitations and contracts a clause substantially the same as the clause at 52.219-10, Incentive Subcontracting Program, when a subcontracting plan is required (see 19.702(a)(1)), and inclusion of a monetary incentive is, in the

judgment of the contracting officer, necessary to increase subcontracting opportunities for small, small disadvantaged and women-owned small business concerns, and is commensurate with the efficient and economical performance of the contract; unless the conditions in paragraph (c)(3) of this section are applicable. The contracting officer may vary the terms of the clause as specified in paragraph (c)(2) of this section.

(2) Various approaches may be used in the development of small, small disadvantaged and women-owned small business concerns' subcontracting incentives. They can take many forms, from a fully quantified schedule of payments based on actual subcontract achievement to an award[-]fee approach employing subjective evaluation criteria (see paragraph (c)(3) of this section). The incentive should not reward the contractor for results other than those that are attributable to the contractor's efforts under the incentive subcontracting program.

(3) As specified in paragraph (c)(2) of this section, the contracting officer may include small, small disadvantaged and women-owned small business subcontracting as one of the factors to be considered in determining the award fee in a cost-plus-award-fee contract; in such cases, however, the contracting officer shall not use the clause at 52.219-10, Incentive Subcontracting Program.

52.219-9 Small, Small Disadvantaged and Women-Owned Small Business

Subcontracting Plan.

As prescribed in 19.708(b), insert the following clause:

SMALL, SMALL DISADVANTAGED AND WOMEN-OWNED

SMALL BUSINESS SUBCONTRACTING PLAN (Date)

(a) This clause does not apply to small business concerns.

~~(b) "Commercial product," as used in this clause, means a product in regular production that is sold in substantial quantities to the general public and/or industry at established catalog or market prices. It also means a product which, in the opinion of the Contracting Officer, differs only insignificantly from the Contractor's commercial product.~~

[(b) Definitions.

As used in this clause--

["Commercial item" means a product or service that satisfies the definition of commercial item in section 2.101 of the Federal Acquisition Regulation.]

["Commercial plan" means a subcontracting plan that covers the offeror's fiscal year and that applies to the entire production of commercial items sold by either the entire company or a portion thereof (e.g., division, plant, or product line).]

["Individual contract plan" means a subcontracting plan that covers the entire contract period (including option periods), applies to a specific contract, and has goals that are based on the offeror's planned subcontracting in support of the specific contract, except that indirect costs incurred for common or joint purposes may be allocated on a prorated basis to the contract.]

["Master plan" means a subcontracting plan that contains all of the required elements, except goals, and may be incorporated into individual plans, provided the master plan has been approved.]

"Subcontract," as used in this clause, means any agreement (other than one involving an employer-employee relationship) entered into by a Federal Government prime contractor or subcontractor calling for supplies or services required for performance of the contract or subcontract.

(c) The offeror, upon request by the Contracting Officer, shall submit and negotiate a subcontracting plan, where applicable, which separately addresses subcontracting with small business concerns, with

small disadvantaged business concerns and with women-owned small business concerns. If the offeror is submitting an individual contract plan, the plan must separately address subcontracting with small business concerns, small disadvantaged business concerns and women-owned small business concerns with a separate part for the basic contract and separate parts for each option (if any). The plan shall be included in and made a part of the resultant contract. The subcontracting plan shall be negotiated within the time specified by the Contracting Officer. Failure to submit and negotiate the subcontracting plan shall make the offeror ineligible for award of a contract.

(d) The offeror's subcontracting plan shall include the following:

(1) Goals, expressed in terms of percentages of total planned subcontracting dollars, for the use of small business concerns, small disadvantaged business concerns and women-owned small business concerns as subcontractors. The offeror shall include all subcontracts that contribute to contract performance, and may include a proportionate share of products and services that are normally allocated as indirect costs.

(2) A statement of--

(i) Total dollars planned to be subcontracted [**for individual plans; or the offeror's total projected sales, expressed in dollars, and the total value of projected subcontracts to support the sales for commercial plans**];

(ii) Total dollars planned to be subcontracted to small business concerns;

(iii) Total dollars planned to be subcontracted to small disadvantaged business concerns; and

(iv) Total dollars planned to be subcontracted to women-owned small business concerns.

(3) A description of the principal types of supplies and services to be subcontracted, and an identification of the types planned for subcontracting to (i) small business concerns, (ii) small disadvantaged business concerns and (iii) women-owned small business concerns.

(4) A description of the method used to develop the subcontracting goals in paragraph (d)(1) of this clause.

(5) A description of the method used to identify potential sources for solicitation purposes (e.g., existing company source lists, the Procurement Automated Source System (PASS) of the Small Business Administration, the National Minority Purchasing Council Vendor Information Service, the Research and Information Division of the Minority Business Development Agency in the Department of Commerce, or small, small disadvantaged and women-owned small business concerns trade associations). A firm may rely on the information contained in PASS as an accurate representation of a concern's size and ownership characteristics for purposes of maintaining a small business source list. A firm may rely on PASS as its small business source list. Use of the PASS as its source list does not relieve a firm of its responsibilities (e.g., outreach, assistance, counseling, publicizing subcontracting opportunities) in this clause.

(6) A statement as to whether or not the offeror included indirect costs in establishing subcontracting goals, and a description of the method used to determine the proportionate share of indirect costs to be incurred with (i) small business concerns, (ii) small disadvantaged business concerns and (iii) women-owned small business concerns.

(7) The name of the individual employed by the offeror who will administer the offeror's subcontracting program, and a description of the duties of the individual.

(8) A description of the efforts the offeror will make to assure that small, small disadvantaged and women-owned small business concerns have an equitable opportunity to compete for subcontracts.

(9) Assurances that the offeror will include the clause in this contract entitled "Utilization of Small, Small Disadvantaged And Women-Owned Small Business Concerns" in all subcontracts that offer further subcontracting opportunities, and that the offeror will require all subcontractors (except small business

concerns) who receive subcontracts in excess of \$500,000 (\$1,000,000 for construction of any public facility), to adopt a plan similar to the plan agreed to by the offeror.

(10) Assurances that the offeror will (i) cooperate in any studies or surveys as may be required, (ii) submit periodic reports ~~in order to allow~~ [so that] the Government ~~to~~ [can] determine the extent of compliance by the offeror with the subcontracting plan, (iii) submit Standard Form (SF) 294, Subcontracting Report for Individual Contracts, and/or SF 295, Summary Subcontract Report, ~~in accordance with~~ [following] the instructions on the forms [or as provided in agency regulations;] and (iv) ensure that its subcontractors agree to submit ~~Standard Forms 294 and 295~~ [SF 294s and SF 295s].

(11) ~~A recitation~~ [description] of the types of records ~~the offeror~~ [that] will [be] maintain[ed] ~~to demonstrate~~ [concerning] procedures that have been adopted to comply with the requirements and goals in the plan, including establishing source lists; and a description of [the offeror's] ~~its~~ efforts to locate small, small disadvantaged and women-owned small business concerns and to award subcontracts to them. The records shall include at least the following (on a plant-wide or company-wide basis, unless otherwise indicated):

(i) Source lists (e.g., PASS), guides, and other data that identify small, small disadvantaged and women-owned small business concerns.

(ii) Organizations contacted in an attempt to locate sources that are small, small disadvantaged or women-owned small business concerns.

(iii) Records on each subcontract solicitation resulting in an award of more than \$100,000, indicating (A) whether small business concerns were solicited and if not, why not, (B) whether small disadvantaged business concerns were solicited and if not, why not, and (C) whether women-owned small

business concerns were solicited and if not, why not, and (D) if applicable, the reason award was not made to a small business concern.

(iv) Records of any outreach efforts to contact (A) trade associations, (B) business development organizations, and (C) conferences and trade fairs to locate small, small disadvantaged and women-owned small business sources.

(v) Records of internal guidance and encouragement provided to buyers through (A) workshops, seminars, training, etc., and (B) monitoring performance to evaluate compliance with the program's requirements.

(vi) On a contract-by-contract basis, records to support award data submitted by the offeror to the Government, including the name, address, and business size of each subcontractor. Contractors having ~~company or division wide annual~~ [commercial] plans need not comply with this requirement.

(e) In order to effectively implement this plan to the extent consistent with efficient contract performance, the Contractor shall perform the following functions:

(1) Assist small, small disadvantaged and women-owned small business concerns by arranging solicitations, time for the preparation of bids, quantities, specifications, and delivery schedules so as to facilitate the participation by such concerns. Where the Contractor's lists of potential small, small disadvantaged and women-owned small business subcontractors are excessively long, reasonable effort shall be made to give all such small business concerns an opportunity to compete over a period of time.

(2) Provide adequate and timely consideration of the potentialities of small, small disadvantaged and women-owned small business concerns in all "make-or-buy" decisions.

(3) Counsel and discuss subcontracting opportunities with representatives of small, small disadvantaged and women-owned small business firms.

(4) Provide notice to subcontractors concerning penalties and remedies for misrepresentations of business status as small, small disadvantaged or women-owned small business for the purpose of obtaining a subcontract that is to be included as part or all of a goal contained in the Contractor's subcontracting plan.

(f) A master **subcontracting** plan on a plant or division-wide basis which contains all the elements required by paragraph (d) of this clause, except goals, may be incorporated by reference as a part of the subcontracting plan required of the offeror by this clause; provided, (1) the master plan has been approved, (2) the offeror ensures that the master plan is updated as necessary and provides copies of the approved master plan, including evidence of its approval, to the Contracting Officer, and (3) goals and any deviations from the master plan deemed necessary by the Contracting Officer to satisfy the requirements of this contract are set forth in the individual subcontracting plan.

~~(g)(1) If a commercial product is offered, the subcontracting plan required by this clause may relate to the offeror's production generally, for both commercial and noncommercial products, rather than solely to the Government contract. In these cases, the offeror shall, with the concurrence of the Contracting Officer, submit one company wide or division wide annual plan.~~

~~—— (2) The annual plan shall be reviewed for approval by the agency awarding the offeror its first prime contract requiring a subcontracting plan during the fiscal year, or by an agency satisfactory to the Contracting Officer.~~

~~—— (3) The approved plan shall remain in effect during the offeror's fiscal year for all of the offeror's commercial products.~~

[(g) With the approval of the Contracting Officer, the offeror may establish a commercial plan (see paragraph (b) of this clause) instead of an individual plan. The commercial plan shall relate

to the offeror's planned subcontracting generally, for both commercial and Government business, rather than solely to the Government contract.]

(h) Prior compliance of the offeror with other such subcontracting plans under previous contracts will be considered by the Contracting Officer in determining the responsibility of the offeror for award of the contract.

(i) The failure of the Contractor or subcontractor to comply in good faith with (1) the clause of this contract entitled "Utilization of Small, Small Disadvantaged Business and Women-Owned Small Business Concerns," or (2) an approved plan required by this clause, shall be a material breach of the contract.

(End of clause)

Alternate I (OCT 1995). When contracting by sealed bidding rather than by negotiation, substitute the following paragraph (c) for paragraph (c) of the basic clause:

(c) The apparent low bidder, upon request by the Contracting Officer, shall submit a subcontracting plan, where applicable, which separately addresses subcontracting with small business concerns, with small disadvantaged business concerns and with women-owned small business concerns. If the bidder is submitting an individual contract plan, the plan must separately address subcontracting with small business concerns, small disadvantaged business concerns and women-owned small business concerns with a separate part for the basic contract and separate parts for each option (if any). The plan shall be included in and made a part of the resultant contract. The subcontracting plan shall be submitted within the time specified by the Contracting Officer. Failure to submit the subcontracting plan shall make the bidder ineligible for the award of a contract.

Alternate II (MAR 1996). As prescribed in 19.708(b)(1), substitute the following paragraph (c) for paragraph (c) of the basic clause:

(c) Proposals submitted in response to this solicitation shall include a subcontracting plan, which separately addresses subcontracting with small business concerns, small disadvantaged business concerns and women-owned small business concerns. If the offeror is submitting an individual contract plan, the plan must separately address subcontracting with small business concerns, small disadvantaged business concerns and women-owned small business concerns with a separate part for the basic contract and separate parts for each option (if any). The plan shall be included in and made a part of the resultant contract. The subcontracting plan shall be negotiated within the time specified by the Contracting Officer. Failure to submit and negotiate a subcontracting plan shall make the offeror ineligible for award of a contract.

* * * * *

52.219-16 Liquidated Damages--Subcontracting Plan.

As prescribed in 19.708(b)(2), insert the following clause:

LIQUIDATED DAMAGES--SUBCONTRACTING PLAN (OCT 1995)

(a) "Failure to make a good faith effort to comply with the subcontracting plan," as used in this clause, means a willful or intentional failure to perform in accordance with the requirements of the subcontracting plan approved under the clause in this contract entitled "Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan," or willful or intentional action to frustrate the plan.

(b) **[Performance shall be measured by applying the percentage goals to the total actual subcontracting dollars or, if a commercial plan is involved, to the pro rata share of actual subcontracting dollars attributable to Government contracts covered by the commercial plan.]** If, at contract completion, or in the case of a commercial ~~product~~ plan, at the close of the fiscal year for which the plan is applicable, the Contractor has failed to meet its subcontracting goals and the Contracting Officer decides in accordance with paragraph (c) of this clause that the Contractor failed to

make a good faith effort to comply with its subcontracting plan, established in accordance with the clause in this contract entitled "Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan," the Contractor shall pay the Government liquidated damages in an amount stated. The amount of probable damages attributable to the Contractor's failure to comply, shall be an amount equal to the actual dollar amount by which the Contractor failed to achieve each subcontract goal[.] ~~or, in the case of a commercial products plan, that portion of the dollar amount allocable to Government contracts by which the Contractor failed to achieve each subcontract goal.~~

(c) Before the Contracting Officer makes a final decision that the Contractor has failed to make such good faith effort, the Contracting Officer shall give the Contractor written notice specifying the failure and permitting the Contractor to demonstrate what good faith efforts have been made **[and to discuss the matter.]** Failure to respond to the notice may be taken as an admission that no valid explanation exists. If, after consideration of all the pertinent data, the Contracting Officer finds that the Contractor failed to make a good faith effort to comply with the subcontracting plan, the Contracting Officer shall issue a final decision to that effect and require that the Contractor pay the Government liquidated damages as provided in paragraph (b) of this clause.

(d) With respect to commercial ~~products plans ; i.e., company-wide or division-wide subcontracting plans approved under paragraph (g) of the clause in this contract entitled, "Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan", the Contracting Officer of the agency that originally approved the plan will exercise the functions of the Contracting Officer under this clause on behalf of all agencies that awarded contracts covered by that commercial products plan.~~ **[the Contracting Officer who approved the plan will perform the functions of the Contracting Officer under this clause on behalf of all agencies with contracts covered by the commercial plan].**

(e) The Contractor shall have the right of appeal, under the clause in this contract entitled, Disputes, from any final decision of the Contracting Officer.

(f) Liquidated damages shall be in addition to any other remedies that the Government may have.

(End of clause)

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MEMORANDUM FOR THE FAR SECRETARIAT

FROM: EDWARD C. LOEB
CHAIRMAN
CIVILIAN AGENCY
ACQUISITION COUNCIL (CAAC)

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SUBJECT: FAR Case 89-42, Liquidated Damages

Enclosed is the aforementioned case, which is being forwarded to the FAR Secretariat for publication as a proposed rule. The rule proposes amending Federal Acquisition Regulation (FAR) 11.501, Subpart 19.7, 52.219-9, and 52.219-16.

Previously, an interim rule was published on July 21, 1989 (54 FR 30708), to require a prime contractor to pay liquidated damages upon a finding of lack of good faith effort to meet its small business subcontracting goals. The rule implemented Section 304 of the Business Opportunity Development Reform Act of 1988, Pub. L. 100-656. Significant revisions to the interim rule were proposed based on an analysis of public comments. The case has now been further revised to implement OFPP Policy Letter 95-1, Subcontracting Plans for companies Supplying Commercial Items," and the draft policy letter on "Subcontracting Plans."

On November 21, 1995, the DAR Council approved the case as a proposed rule. On October 9, 1996, the CAAC approved the case as a proposed rule.

The following are enclosed for your information:

- a. Proposed rule coverage (Atch 1).
- b. Collateral requirements (Atch 2).
- c. DAR Case of November 21, 1995 (Atch 3).
- d. Request for OMB clearance (Atch 4).

This rule shall not be published until specific approval is obtained from the Director or Acting Director. Subject to this approval, please arrange to publish this proposed rule in the Federal Register.

14 12/18

Questions relating to this case may be referred to Ms. Linda Klein on (202) 501-3775.

Attachments

cc: Director, DAR Council

cc: Official file - MVR, Reading file, MVR, MVRR, MV
MVRR:LKlein:lk:501-3775:12/4/96(forward to Sec.) FAR Case 89-42.

Concurrence:

MVR (LKlein) _____ Date: _____

August 19, 1996

Baseline FAR through FAC 90-39

Subpart 11.5--LIQUIDATED DAMAGES

11.501 General.

This subpart provides policies and procedures for the use of liquidated damages clauses in solicitations and contracts for supplies, services, and construction [except for the Liquidated Damages--~~Small Business~~ Subcontracting Plan Clause at 52.219-16 which maybe applied pursuant to 19.705-7].

* * * * *

SUBPART 19.7--SUBCONTRACTING WITH SMALL BUSINESS, SMALL

DISADVANTAGED BUSINESS AND WOMEN-OWNED SMALL BUSINESS CONCERNS

19.701 Definitions.

["Commercial item" means a product or service that satisfies the definition of commercial item in FAR 2.101.]

["Commercial plan" means a subcontracting plan covering the offeror's fiscal year and which is applicable to the entire production of commercial items sold by either the entire company or a portion thereof (e.g., division, plant, or product line).]

"Failure to make a good faith effort to comply with the subcontracting plan,"***

["Individual contract plan" as used in this subpart, means a subcontracting plan that covers the entire contract period (including option periods), applies to a specific contract, and has goals which are based on the offeror's planned subcontracting in support of the specific contract, except that indirect costs incurred for common or joint purposes may be allocated on a prorated basis to the contract.]

["Master plan," as used in this subpart, means a subcontracting plan that contains all of the required elements except goals and may be incorporated into individual contract plans provided the master plan has been approved.]

"Small business subcontractor" means any concern that--

(a) In connection with subcontracts of \$10,000 or less if, including its affiliates, its number of employees does not exceed 500 persons; ~~[has less than or equal to 500 employees, including its affiliates;]~~ and

(b) In connection with subcontracts exceeding \$10,000, if its number of ~~[has]~~ employees or average annual receipts, including its affiliates, ~~[that]~~ does not exceed the size standard under section 19.102 for the product or service it is providing on the subcontract.

"Subcontract," ***.

19.702 Statutory requirements.

Any contractor receiving a contract for more than the simplified acquisition threshold ~~in Part 19.101 [19.101]~~ shall agree in the contract that small business concerns, small disadvantaged business concerns and women-owned small business concerns shall have the maximum practicable opportunity to participate in contract performance consistent with its efficient performance. It is further

the policy of the United States that its prime contractors establish procedures to ensure the timely payment of amounts due pursuant to the terms of their subcontracts with small business concerns, small disadvantaged business concerns and women-owned small business concerns.

(a) Except as stated in paragraph (b) of this section, ~~Section 8(a) of the~~

~~Small Business Act, 15 USC 637(d)(1)~~ imposes the following requirements regarding subcontracting with small businesses and small business subcontracting plans.

(1) In negotiated acquisitions, each solicitation of offers to perform a contract or contract modification, which individually is expected to exceed \$500,000 (\$1,000,000 for construction) and that has subcontracting possibilities shall require the apparently successful offeror to submit an acceptable subcontracting plan. If the apparently successful offeror fails to negotiate a subcontracting plan acceptable to the contracting officer within the time limit prescribed by the contracting officer, the offeror will be ineligible for award.

(2) In sealed bidding acquisitions, each invitation for bids to perform a contract or contract modification, which individually is expected to exceed \$500,000 (\$1,000,000 for construction) and that has subcontracting possibilities, shall require the bidder selected for award to submit a subcontracting plan. If the selected bidder fails to submit a plan within the time limit prescribed by the contracting officer, the bidder will be ineligible for award.

(b) Subcontracting plans (see subparagraphs (a)(1) and (2) of this section) are not required--

(1) From small business concerns;

(2) For personal services contracts;

(3) For contracts or contract modifications that will be performed entirely outside of any State, territory, or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico; or

(4) For modifications to contracts that do not contain the clause at 52.219-8, Utilization of Small ~~Business Concerns and~~ Small Disadvantaged ~~Business Concerns and Women-Owned~~

Small Business Concerns (for contracts prior to 1995-50)

equivalent prior DAB, FFP, or FAS (including, e.g., contracts

awarded before Pub. Law 95-50) and which are within the scope

of the contract.

(c) ***

(d) ***

19.703 Eligibility requirements for participating in the program.

(a) To be eligible as a subcontractor under the program, a concern must represent itself as a small business concern, small disadvantaged business concern or a women-owned small business concern.

(1) To represent itself as a small business concern or a women-owned small business concern, a concern must meet the appropriate definition in 19.001.

(2) ***

(b) A contractor acting in good faith may rely on the written representation of its subcontractor regarding the subcontractor's

status as either a small business concern or a small

disadvantaged business concern or a women-owned small

business concern. The contractor, the contracting officer, or any

other interested party can challenge a subcontractor's size status

representation by filing a protest, in accordance with 13 CFR

121.1601 through 121.1608. Protests challenging a subcontractor's

disadvantaged status representation shall be filed in accordance

with 13 CFR 124.601 through 124.610. Protests challenging a

subcontractor's status as a women-owned small business concern

shall be filed in accordance with Small Business Administration

procedures.

19.704 Subcontracting plan requirements.

- (a) Each subcontracting plan required under 19.702(a)(1) and
(2) must include--

- (1) ***

~~(2)~~ A statement of total dollars planned to be

subcontracted and a statement of the total dollars planned to

be subcontracted to small, small disadvantaged and women-owned small business concerns.

(3) A description of the principal types of supplies and services to be subcontracted and an identification of the types planned for subcontracting to small, small disadvantaged and women-owned small business concerns.

(4) A description of the methods used to develop the subcontracting goals;

(5) A description of the methods used to identify potential sources for solicitation purposes;

(6) A statement as to whether or not the offeror included indirect costs in establishing subcontracting goals, and a description of the method used to determine the proportionate share of indirect costs to be incurred with small, small disadvantaged and women-owned small business concerns.

(7) The name of an individual employed by the offeror who will administer the offeror's subcontracting program, and a description of the duties of the individual;

add 2-6
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~~(S)~~ A description of the efforts the offeror will make to ensure that small business concerns, small disadvantaged business concerns and women-owned small business concerns ~~will have~~ an equitable opportunity to compete for subcontracts;

*Amend by
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~~(S)~~ Assurances that the offeror will include the clause at 52.219-8, Utilization of Small, Small Disadvantaged and Women-Owned Small Business Concerns, (see 19.708(b)), in all subcontracts that offer further subcontracting opportunities, and that the offeror will require all subcontractors (except small business concerns) that receive subcontracts in excess of \$500,000 (\$1,000,000 for construction) to adopt a plan similar to the plan required by the clause at 52.219-9, Small, Small Disadvantaged, and Women-Owned Small Business Subcontracting Plan (see 19.708(c);

~~(S)~~ Assurances that the offeror will (i) cooperate in any studies or surveys as may be required, (ii) submit periodic reports ~~in accordance with the Government to (can) determine the~~ extent of compliance by the offeror with the subcontracting plan,

*revising
(a)(10)(ii) and (ii)
(a)(11)*

and (iii) submit Standard Form (SF) 294, Subcontracting Report for Individual Contracts, and SF 295, Summary Subcontract

Report, in accordance with following instructions on the

forms ~~or as provided in agency regulations; and ensure that its~~

~~subcontractors agree to submit SF 294s and SF 295s.~~

(c) (1) ~~A description of the~~ types of records

~~the offeror (that) will (be) maintained to ensure that~~

~~(general) procedures~~ adopted to comply with the requirements

and goals in the plan, including establishing source lists; and a

description of the offeror's efforts to locate small, small

disadvantaged and women-owned small business concerns and to

award subcontracts to them.

(b) Contractors may establish, on a plant or division-wide basis, a master subcontracting plan ~~((sec 19.701))~~ which contains all

the elements required by the clause at 52.219-9, Small, Small

Disadvantaged and Women-Owned Small Business Subcontracting

Plan, except goals. Master plans shall be effective ~~for a period of~~

year period after approval by the contracting officer; however (a)

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(b) (c)

~~master plan when incorporated in an individual plan shall~~

~~apply to that contract throughout the life of the contract.~~

incumbent upon contractors to maintain and update master plans. Changes required to update master plans are not effective until approved by the contracting officer. A master plan, when incorporated in an individual plan, shall apply to that contract throughout the life of the contract.

(c) ~~For multiple contracts or contracts~~ containing options, the cumulative value of the basic contract and all options is considered in determining whether a subcontracting plan is necessary (see 19.705-2(a)). If a plan is necessary and the offeror is submitting an individual contract plan, the plan shall contain all the elements required by 19.704(a) and shall contain separate

~~statements and goals~~ one for the basic contract and one for each option.

~~(d)~~ Contractors furnishing commercial items may establish a commercial plan (as defined in 19.701) with the approval of the contracting officer. The Contractor shall:

(1) Submit the commercial plan to either (i) the first contracting officer awarding a contract subject to the plan during the offeror's fiscal year, or (ii) if the offeror has ongoing contracts with commercial plans, to the contracting officer ~~responsible for the~~ contract with the latest completion date. The contracting officer shall negotiate the commercial plan for the Government. The approved commercial plan shall remain in effect during the offeror's fiscal year for all Government contracts in effect during the period.

(2) Submit a new commercial plan, 30 days before the end of the fiscal year, to the contracting officer responsible for the uncompleted Government contract with the latest completion date. The contractor must provide each contracting officer responsible for an ongoing contract subject to the plan, the identity of the contracting officer that will be negotiating the new plan. Once the new commercial plan is approved, the Contractor shall provide a copy of the approved

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plan to each contracting officer responsible for an ongoing

contract that is subject to the plan.

19.705 Responsibilities of the contracting officer under the subcontracting assistance program.

19.705-1 General support of the program.

19.705-2 Determining the need for a subcontracting plan.

The contracting officer shall take the following actions to determine whether a proposed contractual action requires a subcontracting plan:

(a) Determine whether the proposed contractual action will meet the dollar threshold in 19.702(a)(1) or (2). If the action includes options or similar provisions, include their value in determining whether the threshold is met.

(b) Determine whether subcontracting possibilities exist by considering relevant factors such as--

(1) Whether firms engaged in the business of furnishing the types of items to be acquired customarily contract for performance

of part of the work or maintain sufficient in-house capability to perform the work; and

(2) Whether there are likely to be product prequalification requirements.

(c) If it is determined that there are no subcontracting possibilities, the determination must be approved at a level above the contracting officer and placed in the contract file.

(f) In solicitations for negotiated acquisitions, the contracting officer may require the submission of subcontracting plans with initial offers, or at any other time prior to award. In determining when subcontracting plans should be required, as well as when and with whom plans should be negotiated, the contracting officer shall consider the integrity of the competitive process, the goal of affording maximum practicable opportunity for small, small disadvantaged and women-owned small business concerns to participate, and the burden placed on offerors.

(d) Due to the complexity of the system acquisition programs, as well as other complex and sensitive negotiations involving formal source selection procedures, may necessitate negotiating subcontracting plans with all firms in a competitive range in order to afford the maximum practicable opportunity for small, small disadvantaged and women owned small business concerns to participate and preserve the integrity of the competitive process. When the simultaneous negotiation of such plans is necessary, the solicitation (1) may require offerors to include proposed subcontracting plans in their initial proposals and (2) may indicate that subcontracting plans will be negotiated concurrently with cost, technical, and management proposals.

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19.705-2

19.705-3 Preparing the solicitation.

19.705-4 Reviewing the subcontracting plan.

19.705-4

The contracting officer shall review the subcontracting plan for adequacy, ensuring that the required information, goals, and assurances are included (see 19.704).

(a) ***

(b) If, under a sealed bid solicitation, a bidder submits a plan that does not cover each of ~~the six (eleven)~~ required elements (see 19.704), the contracting officer shall advise the bidder of the deficiency and request submission of a revised plan by a specific date. If the bidder does not submit a plan which incorporates the ~~six required~~ elements within the time allotted, the bidder shall be ineligible for award. If the plan, although responsive, evidences the bidder's intention not to comply with its obligations under the clause at 52.219-8, Utilization of Small, Small Disadvantaged and Women-Owned Small Business Concerns, the contracting officer may find the bidder nonresponsive.

Amend
(b)

(c) In negotiated acquisitions, the contracting officer shall determine whether the plan is acceptable based on the negotiation of each of ~~the six (eleven)~~ elements of the plan (see 19.704).

Subcontracting goals should be set at a level that the parties reasonably expect can result from the offeror expending good faith efforts to use small, small disadvantaged and women-owned small business subcontractors to the maximum practicable extent. ~~(The~~

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~~Contracting officer shall make an effort to ensure that~~

~~offeror has not substituted the use of small business goals for other~~

~~contracting goals. The contractor shall not be held responsible for~~

~~administrative burden of substantial paperwork. The contractor~~

~~shall not be held responsible for the failure to set goals. The contractor~~

~~shall not be held responsible for the failure to set goals. The contractor~~

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~~shall not be held responsible for the failure to set goals. The contractor~~

~~shall not be held responsible for the failure to set goals. The contractor~~

~~shall not be held responsible for the failure to set goals. The contractor~~

~~shall not be held responsible for the failure to set goals. The contractor~~

~~shall not be held responsible for the failure to set goals. The contractor~~

~~shall not be held responsible for the failure to set goals. The contractor~~

(d) In determining the acceptability of a proposed subcontracting plan, the contracting officer should take the following actions:

(1) Obtain information available from the cognizant

Administrative Contracting Office, as provided for in 19.706(a),

and the offeror's past performance in awarding subcontracts for the same or similar products or services to small, small disadvantaged and women-owned small business concerns. If information is not available on a specific type of product or service, evaluate the offeror's overall past performance and

consider the performance of other contractors or similar

offerors.

(2) ***

(3) Ensure that the subcontracting goals are consistent

with the offeror's plan and past performance.

(3)(4) Evaluate the offeror's make-or-buy policy or program to ensure that it does not conflict with the offeror's proposed subcontracting plan and is in the Government's interest. If the

Revise (d)(1)

Referring

Referring (3) — (1)
as (4) — (1)
and new
Revise (4)(5)

contract involves products or services that are particularly specialized or not generally available in the commercial market, consider the offeror's current capacity to perform the work and the possibility of reduced subcontracting opportunities.

~~(S)~~ Evaluate subcontracting potential, considering the offeror's make-or-buy policies or programs, the nature of the

~~products (supplies) or~~ services to be subcontracted, the known availability of small, small disadvantaged and women-owned

~~(S)~~ business concerns in the geographical area where the work will be performed, ~~and the potential contractor's~~

~~(S)~~ Advise the offeror of available sources of information on potential small, small disadvantaged and women-owned small business subcontractors, as well as any specific concerns known to be potential subcontractors. If the offeror's proposed goals are questionable, the contracting officer shall emphasize that the information should be used to develop realistic and acceptable goals.

§ 1. Obtain advice and recommendations from the SBA procurement center representative (if any) and the agency small business specialist.

19.705-5 Awards involving subcontracting plans.

19.705-6 Postaward responsibilities of the contracting officer.

After a contract or contract modification containing a subcontracting plan is awarded, the contracting officer [redacted] approved the plan, is responsible for the following:

(a) Notifying the SBA of the award by sending a copy of the award document to the Assistant Regional Administrator for Procurement Assistance in the SBA region where the contract will be performed.

(b) Forwarding a copy of each [redacted] plan and any associated approvals to the Assistant Regional Administrator for Procurement Assistance in the SBA region where the contractor's

headquarters is located [REDACTED]
[REDACTED]

(c) Giving to the assigned SBA resident procurement center representative (if any) a copy of--

(1) Any subcontracting plan submitted in response to a sealed bid solicitation; and

(2) The final negotiated subcontracting plan that was incorporated into a negotiated contract or contract modification.

(d) Notifying the SBA resident procurement center representative of the opportunity to review subcontracting plans in connection with contract modifications.

(e) Forwarding a copy of each plan, or a determination that there is no requirement for a subcontracting plan, to the cognizant contract administration office.

(f) Initiating action to assess liquidated damages in accordance with 19.705-7 upon a recommendation by the administrative contracting officer or receipt of other reliable evidence to indicate that such action is warranted.

(g) Taking action to enforce the terms of the contract upon receipt of a notice under 19.705-7 (F).

19.705-7 Liquidated damages.

(a) Maximum practicable utilization of small, small disadvantaged and women-owned small business concerns as subcontractors in Government contracts is a matter of national interest with both social and economic benefits. When a contractor fails to make a good faith effort to comply with a subcontracting plan, these objectives are not achieved, and 15 U.S.C. 637(d)(4)(F) directs that liquidated damages shall be paid by the contractor.

(b) The amount of damages attributable to the contractor's failure to comply shall be equal to the amount of the

dollar amount by which the contractor failed to achieve each subcontracting goal, or, in the case of a commercial product,

the portion of the dollar amount attributable to the failure to achieve each subcontracting goal, or, in the case of a commercial product, the portion of the dollar amount attributable to the failure to achieve each subcontracting goal.

(b)
revised

22
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(c) If, at contract completion [redacted] or in the case of a commercial contract, at the close of the fiscal year for which the plan is applicable, a contractor has failed to meet its subcontracting goals, the contracting officer shall review all available information for any indication that the contractor has not made a good faith effort to comply with the plan. If no such indication is found, the contracting officer shall not take any action. If, however, the contracting officer decides in accordance with paragraph

(d) of this subsection that the contractor failed to make a good faith effort to comply with its subcontracting plan, the contracting officer shall give the contractor written notice specifying the failure, advising the contractor of the possibility that the contractor may have to pay to the Government liquidated damages, and providing a period of 15 working days (or longer period as necessary) within which to respond. The notice shall give the contractor an opportunity to demonstrate what good faith efforts have been made before the contracting officer issues the final

(c) revised

~~revised~~

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decision, and shall further state that failure of the contractor to respond may be taken as an admission that no valid explanation exists. ~~When an explanation is not provided, the contractor is presumed to have failed to make a good faith effort to comply with its subcontracting plan.~~

(d) In determining whether a contractor failed to make a good faith effort to comply with its subcontracting plan, a contracting officer must look to the totality of the contractor's actions, consistent with the information and assurances provided in its plan.

The fact that the contractor failed to meet its subcontracting goals does not, in and of itself, constitute a failure to make a good faith effort. For example, notwithstanding a contractor's diligent effort to identify and solicit offers from small, small disadvantaged and women-owned small business concerns, factors such as unavailability of anticipated sources or unreasonable prices may frustrate achievement of the contractor's goals. However, when considered in the context of the contractor's total effort in accordance with its plan, the following ~~are, though not all inclusive,~~ may be considered ~~as factors (or evidence) of a failure~~

(k)
4th sent
last

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~~28~~

to make a good faith effort: a failure to attempt to identify, contact, solicit, or consider for contract award small, small disadvantaged and women-owned small business concerns; a failure to designate

~~(b) (5) DPP~~ a company official to administer the

subcontracting program ~~(b) (5) DPP~~ monitor and enforce

~~compliance with the plan; a failure to submit subcontracting~~

~~(b) (5) DPP, Subcontracting Report for the [redacted] Contract~~

~~Summary of Findings, Summary Subcontracting Report~~

~~a failure to maintain~~

records or otherwise demonstrate procedures adopted to comply

with the ~~plan~~ ~~(b) (5) DPP~~ the adoption of company policies or

procedures which have as their objectives the frustration of the

objectives of the plan.

(e) If, after consideration of all the pertinent data, the contracting officer finds that the contractor failed to make a good faith effort to comply with its subcontracting plan, the contracting officer shall issue a final decision to the contractor to that effect and require the payment of liquidated damages in an amount

stated. The contracting officer's final decision shall state that the contractor has the right to appeal under the clause in the contract entitled Disputes.

[REDACTED]
[REDACTED]
[REDACTED] company-wide or division-wide subcontracting plan approved
[REDACTED] paragraph (5) of the clause in the contract entitled
[REDACTED] Small, Small Disadvantaged and Women-Owned Small
Business Subcontracting Plan. [REDACTED]
[REDACTED] agency that originally approved the plan will exercise the
[REDACTED]
[REDACTED] functions of the contracting officer and this subsection on
[REDACTED]
[REDACTED] behalf of the [REDACTED]

(f) With respect to commercial plans, approved under

[REDACTED] 249-9, Small, Small
Disadvantaged and Women-Owned Small Business

Subcontracting Plan, the contracting officer that approved the plan shall:

*Initial
Revised
(7) removed*

*26
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(1) Perform the functions of the contracting officer under this subsection on behalf of all agencies with contracts covered by the commercial plan.

(2) Determine whether or not the goals in the commercial plan were achieved and, if they were not achieved, review all available information for an indication that the contractor has not made a good faith effort to comply with the plan, document the results of the review, and provide a copy to the other contracting officers with contracts subject to the commercial plan as listed in the "Remarks" block of the SF 295.

(3) If a determination is made to assess liquidated damages, ~~submit to~~ other contracting officers with contracts incorporating the plan to provide the amount of payments made under their Government contracts subject to the plan that contributed to the contractor's total sales during the contractor's fiscal year in order to calculate and assess liquidated damages on the Government's behalf. For

example: The contractor's total sales are \$50 million and the subcontracting dollars to support the sales are \$20 million or 40 percent. The Government's payments under contracts subject to the plan contributing to the contractor's total sales are \$5 million. Therefore, the prorata share of subcontracting attributable to the Government contracts covered by the plan is 10 percent of \$20 million or \$2 million. If the contractor failed to achieve its small business goal by 1 percent, the liquidated damages would be calculated as 1 percent of \$2 million. A copy of the contracting officer's final decision assessing liquidated damages shall be provided to other contracting officers with contracts subject to the commercial plan as listed in the "Remarks" block of the SF 295.

(g) Liquidated damages shall be in addition to any other remedies that Government may have.

~~(b) Every~~ contracting officer with a contract that is subject to a commercial plan shall include in the contract file: (i) a copy of the approved plan, (ii) a copy of the determination

regarding goals achievement and (if applicable) whether the contractor made a good faith effort to comply with the plan, and (iii) a copy of the final decision assessing liquidating damages, ~~XXXXXXXXXX~~

19.706 Responsibilities of the cognizant administrative contracting officer.

~~XXXXXXXXXX~~ administrative contracting officer is responsible for assisting in evaluating subcontracting plans, and for monitoring, evaluating, and documenting contractor performance under the clause prescribed in 19.708(b) and any subcontracting plan included in the contract. The contract administration office shall provide the necessary information and advice to support the contracting officer, as appropriate, by furnishing--

~~(b) (5) Documentation~~ on the contractor's performance and compliance with subcontracting plans under previous contracts;

~~(a) Intro~~

~~(1) (a)~~

~~(2) b~~

~~(3) c~~

~~(4) d~~

~~(5) e~~

~~(6) f~~

(5) add

(1) removed

redesign

~~(b) (1)~~ Information on the extent to which the contractor is meeting the plan's goals for subcontracting with eligible small, small disadvantaged and women-owned small business concerns;

~~(b) (2)~~ Information on whether the contractor's efforts to ensure the participation of small, small disadvantaged and women-owned small business concerns are in accordance with its subcontracting plan;

~~(b) (3)~~ Information on whether the contractor is requiring its subcontractors to adopt similar subcontracting plans;

~~(b) (4)~~ Notice if, during performance, the contractor is failing to meet its commitments under the clause prescribed in 19.708(b) or the subcontracting plan;

~~(b) (5)~~ Notice and rationale if, during performance, the contractor is failing to comply in good faith with the subcontracting plan; and

~~(b) (6)~~ Notice that performance under the subcontract is complete, that goals were or were not met, and if not met,

whether there is any indication of a lack of a good faith effort

to comply with the subcontracting plan.

(a) The contracting officer shall insert the clause at 52.219-8,

Utilization of Small, Small Disadvantaged and Women-Owned

Small Business Concerns, in solicitations and contracts when the

contract amount is expected to be over the simplified acquisition

threshold in Part 13 unless--

19.707 The Small Business Administration's role in carrying out the program.

19.708 Solicitation provisions and contract clauses.

(a) The contracting officer shall insert the clause at 52.219-8, Utilization of Small, Small Disadvantaged and Women-Owned Small Business Concerns, in solicitations and contracts when the contract amount is expected to be over the simplified acquisition threshold in Part 13 unless--

19.708

(1) A personal services contract is contemplated (see 37.104); or

(2) The contract, together with all its subcontracts, is to be performed entirely outside of any State, territory, or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

(b)(1) The contracting officer shall, when contracting by negotiation, insert the clause at 52.219-9, Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan, in solicitations and contracts that (i) offer subcontracting possibilities, (ii) are expected to exceed \$500,000 (\$1,000,000 for construction of any public facility), and (iii) are required to include the clause at 52.219-8, Utilization of Small, Small Disadvantaged and Women-Owned Small Business Concerns, and

(b)(1)(iii)
revised

~~Disadvantaged and Women-Owned Small Business Concerns, and~~
~~been set aside for small business or is to be accomplished under~~
the 8(a) program. When contracting by sealed bidding rather than by negotiation, the contracting officer shall use the clause with its

Alternate I. When contracting by negotiation, and subcontracting plans are required with initial proposals as provided for in 19.705-2(d), the contracting officer shall use the clause with its Alternate II..

(2) The contracting officer shall insert the clause at 52.219-16, Liquidated Damages-- Subcontracting Plan, in all solicitations and contracts containing the clause at 52.219-9, Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan. ~~on the clause with its Alternate~~

(c)(1) The contracting officer may, when contracting by negotiation, insert in solicitations and contracts a clause substantially the same as the clause at 52.219-10, Incentive Subcontracting Program, when a subcontracting plan is required (see 19.702-4(a)(5)) ~~and~~ inclusion of a monetary incentive is, in the judgment of the contracting officer, necessary to increase subcontracting opportunities for small, small disadvantaged and women-owned small business concerns, and is commensurate with the efficient and economical performance of the contract; unless

19.708
amend (b)(2) by adding "the clause" after "Plan, a"

(C)(1)
amended in the
Paragraph removing (a)(1);

19.708
by removing the word "twice" twice
done
the conditions in (c)(3) ~~below of this section~~ are applicable. The contracting officer may vary the terms of the clause as specified in (c)(2) ~~below of this section~~. done

(2) Various approaches may be used in the development of small, small disadvantaged and women-owned small business concerns' subcontracting incentives. They can take many forms, from a fully quantified schedule of payments based on actual subcontract achievement to an award fee approach employing subjective evaluation criteria (see (c)(3) ~~below of this section~~). done
The incentive should not reward the contractor for results other than those that are attributable to the contractor's efforts under the incentive subcontracting program.

(3) As specified in (c)(2) ~~above of this section~~, the contracting officer may include small, small disadvantaged and women-owned small business subcontracting as one of the factors to be considered in determining the award-fee in a cost-plus-award-fee contract; in such cases, however, the contracting officer

shall not use the clause at 52.219-10, Incentive Subcontracting Program.

52.219-9 Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan.

As prescribed in 19.708(b), insert the following clause:

SMALL, SMALL DISADVANTAGED AND WOMEN-OWNED SMALL BUSINESS SUBCONTRACTING PLAN

DATE

(a) This clause does not apply to small business concerns.

[REDACTED]

[REDACTED]

quantities to the general public and/or industry at established

catalog or market prices. It shall not be a product which, in the

opinion of the Contracting Officer, differs only insignificantly

from the [REDACTED] commercial product.

[REDACTED]

Review date

Review (S)

~~Commercial item~~ "Commercial item" means a product or service that

satisfies the definition of commercial item in FAR 2. ~~101.41~~

~~Contract plan~~ "Contract plan" means a subcontracting plan covering

the offeror's fiscal year and which is applicable to the entire

production of commercial items sold by either the entire

company or portion thereof (e.g., division, plant, or product

~~line~~

~~Contract plan~~ "Contract plan" as used in this ~~subpart~~ [clause],

means a subcontracting plan which covers the entire contract

period (including option periods), applies to a specific contract,

and has goals which are based on the offeror's planned

subcontracting in support of the specific contract, except that

indirect cost incurred for common or joint purposes may be

allocated on a prorated basis to the contract. ~~101.42~~

~~Master plan~~ "Master plan" as used in this ~~subpart~~ [clause] means a

subcontracting plan which contains all of the required

elements except goals and may be incorporated into individual

plans provided the master plan has been approved. ~~101.43~~

"Subcontract," as used in this clause, means any agreement (other than one involving an employer-employee relationship) entered into by a Federal Government prime contractor or subcontractor calling for supplies or services required for performance of the contract or subcontract.

(c) The offeror, upon request by the Contracting Officer, shall submit and negotiate a subcontracting plan, where applicable, which separately addresses subcontracting with small business concerns, with small disadvantaged business concerns and with women-owned small business concerns. If the offeror is submitting an individual contract plan, the plan must separately address subcontracting with small business concerns, small disadvantaged business concerns, and women-owned small business concerns with a separate part for the basic contract and separate parts for each option (if any). The plan shall be included in and made a part of the resultant contract. The subcontracting plan shall be negotiated within the time specified by the Contracting Officer. Failure to submit and negotiate the

subcontracting plan shall make the offeror ineligible for award of a contract.

(d) The offeror's subcontracting plan shall include the following:

(1) Goals, expressed in terms of percentages of total planned subcontracting dollars, for the use of small business concerns, small disadvantaged business concerns and women-owned small business concerns as subcontractors. The offeror shall include all subcontracts that contribute to contract performance, and may include a proportionate share of products and services that are normally allocated as indirect costs.

(2) A statement of--

(i) Total dollars planned to be subcontracted

individual plans; or the offeror's total projected sales;

expressed in dollars; and the total value of projects

subcontracted to support the sales for commercial plans;

(ii) Total dollars planned to be subcontracted to small business concerns;

Revise (d)(2)(i)

(iii) Total dollars planned to be subcontracted to small disadvantaged business concerns; and

(iv) Total dollars planned to be subcontracted to women-owned small business concerns.

(3) A description of the principal types of supplies and services to be subcontracted, and an identification of the types planned for subcontracting to (i) small business concerns and (ii) small disadvantaged business concerns and (iii) women-owned small business concerns.

(4) A description of the method used to develop the subcontracting goals in paragraph (b)(1) ~~the goal of the company~~ done

(5) A description of the method used to identify potential sources for solicitation purposes ~~(e.g., existing company source lists, the Procurement Automated Source System (PASS) of the Small Business Administration, the National Minority Purchasing Council Vendor Information Service, the Research and Information Division of the Minority Business Development Agency in the Department of Commerce, or small, small disadvantaged and~~

women-owned small business concerns trade associations). A firm may rely on the information contained in PASS as an accurate representation of a concern's size and ownership characteristics for purposes of maintaining a small business source list. A firm may rely on PASS as its small business source list. Use of the PASS as its source list does not relieve a firm of its responsibilities (including outreach, assistance, counseling, publicizing subcontracting opportunities) in this clause.

(6) A statement as to whether or not the offeror included indirect costs in establishing subcontracting goals, and a description of the method used to determine the proportionate share of indirect costs to be incurred with (i) small business concerns and (ii) small disadvantaged business concerns and (iii) women-owned small business concerns.

(7) The name of the individual employed by the offeror who will administer the offeror's subcontracting program, and a description of the duties of the individual.

(8) A description of the efforts the offeror will make to assure that small, small disadvantaged and women-owned small business concerns have an equitable opportunity to compete for subcontracts.

(9) Assurances that the offeror will include the clause in this contract entitled "Utilization of Small, Small Disadvantaged And Women-Owned Small Business Concerns" in all subcontracts that offer further subcontracting opportunities, and that the offeror will require all subcontractors (except small business concerns) who receive subcontracts in excess of \$500,000 (\$1,000,000 for construction of any public facility), to adopt a plan similar to the plan agreed to by the offeror.

(10). Assurances that the offeror will (i) cooperate in any studies or surveys as may be required, (ii) submit periodic reports

~~in order to allow so that the Government is able to determine the~~

extent of compliance by the offeror with the subcontracting plan, and (iii) submit Standard Form (SF) 294, Subcontracting Report for Individual Contracts, and SF 295, Summary Subcontract

52. 219-9
(9)(10)(11)
revised

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Report to be prepared in accordance with the instructions on the

forms or as provided in any regulatory and compliance

subsections of the 2010 Small Business Act.

(b)(1) The report shall include the type of records

that will be used to determine compliance

procedures adopted to comply with the requirements and goals in

the plan, including establishing source lists; and a description of

the offeror's efforts to locate small, small disadvantaged and

women-owned small business concerns and to award subcontracts

to them. The records shall include at least the following (on a

plant-wide or company-wide basis, unless otherwise indicated):

(i) Source lists, (e.g., PASS) guides, and other data that identify small, small disadvantaged and women-owned small business concerns.

(ii) Organizations contacted in an attempt to locate sources that are small, small disadvantaged or women-owned small business concerns.

(d)(11)
15+ sent
revised

(d)(11)(ii) amended

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(iii) Records on each subcontract solicitation resulting in an award of more than \$100,000, indicating (A) whether small business concerns were solicited and if not, why not, (B) whether small disadvantaged business concerns were solicited and if not, why not, and (C) whether women-owned small business concerns were solicited and if not, why not, (D) if applicable, the reason award was not made to a small business concern.

(iv) Records of any outreach efforts to contact (A) trade associations, (B) business development organizations, and (C) conferences and trade fairs to locate small, small disadvantaged and women-owned small business sources.

(v) Records of internal guidance and encouragement ~~provided~~ provided to buyers through (A) workshops, seminars, training, etc., and (B) monitoring performance to evaluate compliance with the program ~~and~~ requirements. ✓

(vi) On a contract-by-contract basis, records to support award data submitted by the offeror to the Government, including the name, address, and business size of each subcontractor.

Contractors having ~~any other business relationship with the~~

~~commercial plans~~ need not comply with this requirement.

(d)(11)(vi)
2nd sent.

(e) In order to effectively implement this plan to the extent consistent with efficient contract performance, the Contractor shall perform the following functions:

(1) Assist small, small disadvantaged and women-owned small business concerns by arranging solicitations, time for the preparation of bids, quantities, specifications, and delivery schedules so as to facilitate the participation by such concerns.

Where the Contractor's lists of potential small, small disadvantaged and women-owned small business subcontractors are excessively long, reasonable effort shall be made to give all such small business concerns an opportunity to compete over a period of time.

(2) Provide adequate and timely consideration of the potentialities of small, small disadvantaged and women-owned small business concerns in all "make-or-buy" decisions.

(3) Counsel and discuss subcontracting opportunities with representatives of small, small disadvantaged and women-owned small business firms.

(4) Provide notice to subcontractors concerning penalties and remedies for misrepresentations of business status as small, small disadvantaged or women-owned small business for the purpose of obtaining a subcontract that is to be included as part or all of a goal contained in the Contractor's subcontracting plan.

(f) A master ~~subcontracting plan~~ on a plant or division-wide basis which contains all the elements required by paragraph (d)

~~parts of this clause~~ use, except goals, may be incorporated by *(done)* reference as a part of the subcontracting plan required of the offeror by this clause; provided, (1) the master plan has been approved, (2) the offeror ensures that the master plan is updated as necessary and provides copies of the approved master plan, including ~~and evidence~~ of its approval to the Contracting Officer, and (3) goals and any deviations from the master plan deemed

(f) amended

necessary by the Contracting Officer to satisfy the requirements of this contract are set forth in the individual subcontracting plan.

[REDACTED]

[REDACTED] use may relate to the offeror's

[REDACTED] generally, for both commercial and noncommercial

products, rather than only for government contracts.

[REDACTED] the offeror shall, in the

[REDACTED] subcontracting plan, state the company's

[REDACTED] subcontracting plan.

(2) The offeror shall, in the

[REDACTED] agency's

[REDACTED] subcontracting plan, state the

[REDACTED] satisfactory

(3) The subcontracting plan shall remain in effect during the

[REDACTED] offeror's

[REDACTED]

[(g) With the approval of the contracting officer, the offeror

[REDACTED] may [REDACTED] establish a commercial plan (see paragraph (b)

(2) revised

[REDACTED] of this clause) instead of [REDACTED] plan [REDACTED] or [REDACTED]

[REDACTED] plan shall result in the [REDACTED] plan [REDACTED] contracting

[REDACTED] generally, for both commercial and Government business,

[REDACTED] rather than solely to the Government contractor.

(h) Prior compliance of the offeror with other such subcontracting plans under previous contracts will be considered by the Contracting Officer in determining the responsibility of the offeror for award of the contract.

(i) The failure of the Contractor or subcontractor to comply in good faith with (1) the clause of this contract entitled "Utilization of Small, Small Disadvantaged ~~Businesses and Women-Owned~~ Small Business Concerns," or (2) an approved plan required by this clause, shall be a material breach of the contract.

(End of clause)

DATE
[REDACTED] (Aug 1989 - [REDACTED] 1995)

?

(i) Recommended

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DATE ~~11/22/2008~~
Alternate ~~11/22/2008~~ as prescribed in 19.708(b)(1),
substitute the following paragraph (c) for paragraph (c) of the
basic clause:

(c) Proposals submitted in response to this solicitation shall include a subcontracting plan, which separately addresses subcontracting with small business concerns, small disadvantaged business concerns and women-owned small business concerns. If the offeror is submitting an individual contract plan, the plan must separately address subcontracting with small business concerns, small disadvantaged business concerns and women-owned small business concerns with a separate part for the basic contract and separate parts for each option (if any). The plan shall be included in and made a part of the resultant contract. The subcontracting plan shall be negotiated within the time specified by the Contracting Officer. Failure to submit and negotiate a subcontracting plan shall make the offeror ineligible for award of a contract.

7
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{52.219-16} Liquidated Damages--Small Business

Subcontracting Plan.

As prescribed in 19.708(b)(2), insert the following clause:

LIQUIDATED DAMAGES--~~SMALL BUSINESS~~

SUBCONTRACTING PLAN ~~(OCT 1993)~~ DATE

(a) "Failure to make a good faith effort to comply with the subcontracting plan," as used in this clause, means a willful or intentional failure to perform in accordance with the requirements of the subcontracting plan approved under the clause in this contract entitled "Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan," or willful or intentional action to frustrate the plan. *done self*

(b) Performance shall be measured by applying the

percentage of the total actual subcontracting dollars or, if

a commercial plan is involved, to the proportionate share of actual

subcontracting dollars attributable to Government contracts

covered by the commercial plan at contract completion, or

in the case of a commercial product plan, at the close of the fiscal year for which the plan is applicable, the Contractor has failed to meet its subcontracting goals and the Contracting Officer decides in accordance with paragraph (c) of this clause that the Contractor failed to make a good faith effort to comply with its subcontracting plan, established in accordance with the clause in this contract entitled Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plans, the Contractor shall pay the Government liquidated damages in an amount stated. The amount of probable damages attributable to the Contractor's failure to comply, shall be an amount equal to the actual dollar amount by which the Contractor failed to achieve each subcontract goal.

~~the Contractor shall pay the Government liquidated damages in an amount stated. The amount of probable damages attributable to the Contractor's failure to comply, shall be an amount equal to the actual dollar amount by which the Contractor failed to achieve each subcontract goal.~~

(c) Before the Contracting Officer makes a final decision that the Contractor has failed to make such good faith effort, the Contracting Officer shall give the Contractor written notice

specifying the failure and permitting the Contractor to demonstrate

what good faith efforts have been made ~~and to discuss the~~

~~Contractor~~

Failure to respond to the notice may be taken as an admission that no valid explanation exists. If, after consideration of all the pertinent data, the Contracting Officer finds that the Contractor failed to make a good faith effort to comply with the subcontracting plan, the Contracting Officer shall issue a final decision to that effect and require that the Contractor pay the Government liquidated damages as provided in paragraph (b) of this clause.

(d) With respect to commercial ~~plants, etc., owned under~~

~~wide ownership with subcontracting plan approved under~~

~~contracting plan, the Contracting Officer shall~~

~~Small Disadvantaged and Women Owned Small Business~~

~~Contracting Plan, the Contracting Officer of the agency~~

~~that originally approved the plan will review the performance of~~

~~the Contracting Officer and the Contractor shall~~

~~agencies that awarded contracts~~
~~under the~~ Contracting Officer who approved the plan
will perform the functions of the Contracting Officer under
this clause on behalf of all agencies with contracts covered by
the commercial ~~contract~~

(e) The Contractor shall have the right of appeal, under the
clause in this contract entitled, Disputes, from any final decision of
the Contracting Officer.

(f) Liquidated damages shall be in addition to any other
remedies that ~~the~~ Government may have.

done
ack

(End of clause)

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SUBCONTRACTING REPORT FOR INDIVIDUAL CONTRACTS (See instructions on reverse)				OMB No.: 9000-0006 Expires: 03/31/98	
Public reporting burden for this collection of information is estimated to average 3 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the FAR Secretariat (VRS), Office of Federal Acquisition Policy, GSA, Washington, DC 20405.					
1. CORPORATION, COMPANY OR SUBDIVISION COVERED				3. DATE SUBMITTED	
a. COMPANY NAME					
5. STREET ADDRESS				4. REPORTING PERIOD FROM INCEPTION OF CONTRACT THRU:	
c. CITY				<input type="checkbox"/> MAR 31 <input type="checkbox"/> SEPT 30 YEAR	
d. STATE e. ZIP CODE					
2. CONTRACTOR'S ESTABLISHMENT CODE				5. TYPE OF REPORT	
				<input type="checkbox"/> REGULAR <input type="checkbox"/> FINAL <input type="checkbox"/> REVISED	
6. ADMINISTERING ACTIVITY (Please check applicable box)					
<input type="checkbox"/> ARMY <input type="checkbox"/> NAVY <input type="checkbox"/> AIR FORCE		<input type="checkbox"/> GSA <input type="checkbox"/> DOE <input type="checkbox"/> DEFENSE LOGISTICS AGENCY		<input type="checkbox"/> NASA <input type="checkbox"/> OTHER FEDERAL AGENCY (Specify)	
7. REPORT SUBMITTED AS (Check one and provide appropriate number)				8. AGENCY OR CONTRACTOR AWARDOING CONTRACT	
<input type="checkbox"/> PRIME CONTRACTOR <input type="checkbox"/> SUBCONTRACTOR		PRIME CONTRACT NUMBER		a. AGENCY'S OR CONTRACTOR'S NAME	
		SUBCONTRACT NUMBER		b. STREET ADDRESS	
9. COLLARS AND PERCENTAGES IN THE FOLLOWING BLOCKS:				c. CITY	
<input type="checkbox"/> DO INCLUDE INDIRECT COSTS <input type="checkbox"/> DO NOT INCLUDE INDIRECT COSTS				d. STATE e. ZIP CODE	
SUBCONTRACT AWARDS					
TYPE	CURRENT GOAL		ACTUAL CUMULATIVE		
	WHOLE DOLLARS	PERCENT	WHOLE DOLLARS	PERCENT	
10a. SMALL BUSINESS CONCERNS (Include SDB, WOSB, HBCU/MII) (Dollar Amount and Percent of 10c.)					
10b. LARGE BUSINESS CONCERNS (Dollar Amount and Percent of 10c.)					
10c. TOTAL (Sum of 10a and 10b.)		100.0%			100.0%
11. SMALL DISADVANTAGED (SDB) CONCERNS (Include HBCU/MII) (Dollar Amount and Percent of 10c.)					
12. WOMEN-OWNED SMALL BUSINESS (WOSB) CONCERNS (Dollar Amount and Percent of 10c.)					
13. REMARKS					
14a. NAME OF INDIVIDUAL ADMINISTERING SUBCONTRACTING PLAN				14b. TELEPHONE NUMBER	
				AREA CODE NUMBER	

GENERAL INSTRUCTIONS

1. This report is not required from small businesses.

2. This report is not required for commercial products for which a company-wide annual plan (i.e., a Commercial Products Plan) has been approved, nor from large businesses in the Department of Defense (DOD) Test Program for Negotiation of Comprehensive Subcontracting Plans. The Summary Subcontract Report (SF 295) is required for contractors operating under one of these two conditions and should be submitted to the Government in accordance with the instructions on that form.

3. This form collects subcontract award data from prime contractors/subcontractors that: (a) hold one or more contracts over \$500,000 (over \$1,000,000 for construction of a public facility); and (b) are required to report subcontracts awarded to Small Business (SB), Small Disadvantaged Business (SDB), and Women-Owned Small Business (WOSB) concerns under a subcontracting plan. For the Department of Defense (DOD), the National Aeronautics and Space Administration (NASA), and the Coast Guard, this form also collects subcontract award data for Historically Black Colleges and Universities (HBCUs) and Minority Institutions (MIs).

4. This report is required for each contract containing a subcontracting plan and must be submitted to the administrative contracting officer (ACO) or contracting officer if no ACO is assigned, semi-annually during contract performance for the periods ended March 31st and September 30th. A separate report is required for each contract at contract completion. Reports are due 30 days after the close of each reporting period unless otherwise directed by the contracting officer. Reports are required when due, regardless of whether there has been any subcontracting activity since the inception of the contract or since the previous report.

5. Only subcontracts involving performance within the U.S., its possessions, Puerto Rico, and the Trust Territory of the Pacific Islands should be included in this report.

6. Purchases from a corporation, company, or subdivision that is an affiliate of the prime/subcontractor are not included in this report.

7. Subcontract award data reported on this form by prime contractors/subcontractors shall be limited to awards made to their immediate subcontractors. Credit cannot be taken for awards made to lower tier subcontractors.

SPECIFIC INSTRUCTIONS

BLOCK 2: Enter the nine-position Contractor Establishment Code (CEC) that identifies the specific contractor establishment. (The CEC consists of eight digits followed by one letter. It is the responsibility of the contracting activity to obtain the CEC for a company that does not have one. The CEC is to coincide with the address in Block 1.)

BLOCK 4: Check only one. Note that all subcontract award data reported on this form represents activity since the inception of the contract through the date indicated in this block.

BLOCK 5: Check whether this report is a "Regular," "Final," and/or "Revised" report. A "Final" report should be checked only if the contractor has completed the contract or subcontract reported in Block 7. A "Revised" report is a change to a report previously submitted for the same period.

BLOCK 8: Identify the department or agency administering the majority of subcontracting plans.

BLOCK 7: Indicate whether the reporting contractor is submitting this report as a prime contractor or subcontractor and the prime contract or subcontract number.

BLOCK 8: Enter the name and address of the Federal department or agency awarding the contract or the prime contractor awarding the subcontract.

BLOCK 9: Check the appropriate block to indicate whether indirect costs are included in the dollar amounts in blocks 10a through 12. To ensure comparability between the goal and actual columns, the contractor may include indirect costs in the actual column only if the subcontracting plan included indirect costs in the goal.

BLOCKS 10a through 12: Under "Current Goal," enter the dollar and percent goals in each category (SB, SDB, and WOSB) from the subcontracting plan approved for this contract. (If the original goals agreed upon at contract award have been revised as a result of contract modifications, enter the original goals in Block 13. The amounts entered in Blocks 10a through 12 should reflect the revised goals.) Under "Actual Cumulative," enter actual subcontract achievements (dollar and percent) from the inception of the contract through the date of the report shown in Block 4. In cases where indirect costs are included, the amounts should include both direct awards and an appropriate prorated portion of indirect awards.

BLOCK 10a: Report all subcontracts awarded to SBs including subcontracts to SDBs and WOSBs. For DOD, NASA, and Coast Guard contracts, include subcontracting awards to HBCUs and MIs.

BLOCK 10b: Report all subcontracts awarded to large businesses (LBs).

BLOCK 10c: Report on this line the total of all subcontracts awarded under this contract (the sum of lines 10a and 10b).

BLOCKS 11 and 12: Each of these items is a subcategory of Block 10a. Note that in some cases the same dollars may be reported in both Block 11 and Block 12 (i.e., SDBs owned by women).

BLOCK 11: Report all subcontracts awarded to SDBs (including women-owned SDBs). For DOD, NASA, and Coast Guard contracts, include subcontract awards to HBCUs and MIs.

BLOCK 12: Report all subcontracts awarded to Women-Owned firms (including SDBs owned by women).

BLOCK 13: Enter a short narrative explanation if (a) SB, SDB, or WOSB accomplishments fall below that which would be expected using a straight-line projection of goals through the period of contract performance; or (b) if this is a final report, any one of the three goals was not met.

SPECIAL INSTRUCTIONS FOR COMMERCIAL PRODUCTS PLANS

DEFINITIONS

1. Commercial products means products sold in substantial quantities to the general public and/or industry at established catalog or market prices. *item means a product or service that satisfies the definition of commercial item in FAR 2.101*
2. Commercial plan means a contract, purchase order, amendment, or other legal obligation executed by the prime contractor/subcontractor calling for supplies or services required for the performance of the original contract or subcontract.

3. Direct Subcontract Awards are those that are identified with the performance of one or more specific Government contract(s).

4. Indirect costs are those which, because of incurrence for common or joint purposes, are not identified with specific Government contracts; these awards are related to Government contract performance but remain for allocation after direct awards have been determined and identified to specific Government contracts.

DISTRIBUTION OF THIS REPORT

For the Awarding Agency or Contractor:

The original copy of this report should be provided to the contracting officer at the agency or contractor identified in Block 8. For contracts with DOD, a copy should also be provided to the Defense Logistics Agency (DLA) at the cognizant Defense Contract Management Area Operations (DCMAO) office.

For the Small Business Administration (SBA):

A copy of this report must be provided to the cognizant Commercial Market Representative (CMR) at the time of a compliance review. It is NOT necessary to mail the SF 294 to SBA unless specifically requested by the CMR.

2. Commercial plan means a subcontracting plan covering the offeror's fiscal year and which is applicable to the entire production of commercial items sold by either the offeror or a subcontractor thereof.

FAC 90-32 OCTOBER 1, 1995

PART 33—FORMS

53.301-295

SUMMARY SUBCONTRACT REPORT (See instructions on reverse)		OMB No.: 9000-0007 Expires: 03/31/93	
Public reporting burden for this collection of information is estimated to average 10 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the FAR Secretariat (VRS), Office of Federal Acquisition Policy, GSA, Washington, DC 20405.			
1. CORPORATION, COMPANY OR SUBDIVISION COVERED		3. DATE SUBMITTED	
a. COMPANY NAME			
b. STREET ADDRESS		4. REPORTING PERIOD:	
c. CITY		<input type="checkbox"/> OCT 1 - MAR 31 <input type="checkbox"/> OCT 1 - SEPT 30 YEAR	
d. STATE e. ZIP CODE		5. TYPE OF REPORT	
2. CONTRACTOR'S ESTABLISHMENT CODE		<input type="checkbox"/> REGULAR <input type="checkbox"/> FINAL <input type="checkbox"/> REVISED	
6. ADMINISTERING ACTIVITY (Please check applicable box)			
<input type="checkbox"/> ARMY <input type="checkbox"/> DEFENSE LOGISTICS AGENCY <input type="checkbox"/> OOE <input type="checkbox"/> NAVY <input type="checkbox"/> NASA <input type="checkbox"/> OTHER FEDERAL AGENCY (Specify) <input type="checkbox"/> AIR FORCE <input type="checkbox"/> GSA			
7. REPORT SUBMITTED AS (Check one)		8. TYPE OF PLAN	
<input type="checkbox"/> PRIME CONTRACTOR <input type="checkbox"/> BOTH <input type="checkbox"/> INDIVIDUAL <input type="checkbox"/> COMMERCIAL PRODUCTS			
<input type="checkbox"/> SUBCONTRACTOR		IF PLAN IS A COMMERCIAL PRODUCTS PLAN, SPECIFY THE PERCENTAGE OF THE DOLLARS ON THIS REPORT ATTRIBUTABLE TO THIS AGENCY. ▶	
9. CONTRACTOR'S MAJOR PRODUCTS OR SERVICE LINES			
a.	c.		
b.	d.		
CUMULATIVE FISCAL YEAR SUBCONTRACT AWARDS (Report cumulative figures for reporting period in Block 4)			
TYPE		WHOLE DOLLARS	PERCENT (To nearest tenth of a %)
10a. SMALL BUSINESS CONCERNS (Include SDB, WOSB, HBCU/MI) (Dollar Amount and Percent of 10c.)			
10b. LARGE BUSINESS CONCERNS (Dollar Amount and Percent of 10c.)			
10c. TOTAL (Sum of 10a and 10b.)			100.0%
11. SMALL DISADVANTAGED (SDB) CONCERNS (Dollar Amount and Percent of 10c.)			
12. WOMEN-OWNED SMALL BUSINESS (WOSB) CONCERNS (Dollar Amount and Percent of 10c.)			
13. HISTORICALLY BLACK COLLEGES AND UNIVERSITIES (HBCU) AND MINORITY INSTITUTIONS (MI) (If applicable) (Dollar Amount and Percent of 10c.)			
14. REMARKS			
15. CONTRACTOR'S OFFICIAL WHO ADMINISTERS SUBCONTRACTING PROGRAM			
a. NAME	b. TITLE	c. TELEPHONE NUMBER	
		AREA CODE	NUMBER
16. CHIEF EXECUTIVE OFFICER			
a. NAME	c. SIGNATURE		
b. TITLE	d. DATE		

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FEDERAL ACQUISITION REGULATION (FAR)

GENERAL INSTRUCTIONS

1. This report is not required from small businesses.

2. This form collects subcontract award data from prime contractors/subcontractors that: (a) hold one or more contracts over \$500,000 (over \$1,000,000 for construction of a public facility); and (b) are required to report subcontracts awarded to Small Business (SBI), Small Disadvantaged Business (SDB), and Women-Owned Small Business (WOSB) concerns under a subcontracting plan. For the Department of Defense (DOD), the National Aeronautics and Space Administration (NASA), and the Coast Guard, this form also collects subcontract award data for Historically Black Colleges and Universities (HBCU) and Minority Institutions (MI).

3. This report must be submitted semi-annually (for the six months ended March 31st and the twelve months ended September 30th) for contracts with the Department of Defense (DOD) and annually (for the twelve months ended September 30th) for contracts with civilian agencies, except for contracts covered by an approved Commercial Products Plan (see special instructions in right-hand column). Reports are due 30 days after the close of each reporting period.

4. This report may be submitted on a corporate, company, or subdivision (e.g., plant or division operating on a separate profit center) basis, unless otherwise directed by the agency awarding the contract.

5. If a prime contractor/subcontractor is performing work for more than one Federal agency, a separate report shall be submitted to each agency covering only that agency's contracts, provided at least one of that agency's contracts is over \$500,000 (over \$1,000,000 for construction of a public facility) and contains a subcontracting plan. (Note that DOD is considered to be a single agency; see next instruction.)

6. For DOD, a consolidated report should be submitted for all contracts awarded by military department/agencies and/or subcontracts awarded by DOD prime contractors. However, DOD contractors involved in construction and related maintenance and repair must submit a separate report for each DOD component.

7. Only subcontracts involving performance within the U.S., its possessions, Puerto Rico, and the Trust Territory of the Pacific Islands should be included in this report.

8. Purchases from a corporation, company, or subdivision that is an affiliate of the prime/subcontractor are not included in this report.

9. Subcontract award data reported on this form by prime contractor/subcontractors shall be limited to awards made to their immediate subcontractors. Credit cannot be taken for awards made to lower tier subcontractors.

10. See special instructions in right-hand column for Commercial Products Plans.

SPECIFIC INSTRUCTIONS

BLOCK 2: Enter the nine-position Contractor Establishment Code (CEC) that identifies the specific contractor establishment. (The CEC consists of eight digits followed by one letter. It is the responsibility of the contracting activity to obtain the CEC for a company that does not have one. The CEC is to coincide with the address in Block 1.)

BLOCK 4: Check only one. Note that March 31 represents the six months from October 1st and that September 30th represents the twelve months from October 1st. Enter the year of the reporting period, (i.e., Mar

BLOCK 5: Check whether this report is a "Regular," "Final," and/or "Revised" report. A "Final" report should be checked only if the contractor has completed all the contracts containing subcontracting plans awarded by the agency to which it is reporting. A "Revised" report is a change to a report previously submitted for the same period.

BLOCK 6: Identify the department or agency administering the majority of subcontracting plans.

BLOCK 7: This report encompasses all contracts with the Federal Government for the agency to which it is submitted, including subcontracts received from other large businesses that have contracts with the same agency. Indicate in this block whether the contractor is a prime contractor, subcontractor, or both (check only one).

BLOCK 8: Check only one. Check "Commercial Products Plan" only if this report is under an approved Commercial Products Plan. For a Commercial Products Plan, the contractor must specify the percentage of dollars in Blocks 10a through 13 attributable to the agency to which this report is being submitted.

BLOCK 9: Identify the major product or service lines of the reporting organization.

BLOCKS 10a through 13: These entries should include all subcontract awards resulting from contracts or subcontracts, regardless of dollar amount, received from the agency to which this report is submitted. If reporting as a subcontractor, report all subcontracts awarded under prime contracts. Amounts should include both direct awards and an appropriate prorated portion of indirect awards. (The indirect portion is based on the percentage of work being performed for the organization to which the report is being submitted in relation to other work being performed by the prime contractor/subcontractor.) Do not include awards made in support of commercial business unless "Commercial Products Plan" is checked in Block 8 (see Special Instructions for Commercial Products Plans in right-hand column).

Report only those dollars subcontracted this fiscal year for the period indicated in Block 4.

BLOCK 10a: Report all subcontracts awarded to SDBs including subcontracts to SDBs and WOSBs. For DOD, NASA, and Coast Guard contracts, include subcontracting awards to HBCUs and MIs.

BLOCK 10b: Report all subcontracts awarded to large businesses (L3s).

BLOCK 10c: Report on this line the grand total of all subcontracts (the sum of lines 10a and 10b).

BLOCKS 11 and 13: Each of these items is a subcategory of Block 10a. Note that in some cases the same dollar may be reported on both Block 11 and Block 12 (i.e., SDBs owned by women); likewise subcontracts to HBCUs or MIs should be reported on both Block 11 and 13.

BLOCK 11: Report all subcontracts awarded to SDBs (including women-owned SDBs). For DOD, NASA, and Coast Guard contracts, include subcontract awards to HBCUs and MIs.

BLOCK 12: Report all subcontracts awarded to Women-Owned Small Business firms (including SDBs owned by women).

BLOCK 13 (For contracts with DOD, NASA, and Coast Guard): Enter the dollar value of all subcontracts with HBCUs/MIs.

SPECIAL INSTRUCTIONS FOR COMMERCIAL PRODUCTS PLANS

1. This report is due on October 30th each year for the previous fiscal year ended September 30th.

2. The annual report submitted by reporting organizations that have an approved company-wide annual subcontracting plan for commercial products shall include all subcontracting activity under commercial products plans in effect during the year and shall be submitted in addition to the required report for other-than-commercial products if any.

3. Enter in Blocks 10a through 13 the total of all subcontract awards under the contractor's Commercial Products Plan. Show in Block 8 the percentage of this total that is attributable to the agency to which this report is being submitted. This report must be submitted to each agency from which contracts for commercial products covered by an approved Commercial Products Plan were received.

DEFINITIONS

1. Commercial products means products sold in substantial quantities to the general public and/or industry at established catalog or market prices.

2. Subcontract means a contract, purchase order, amendment, or other legal obligation executed by the prime contractor/subcontractor calling for supplies or services required for the performance of the original contract or subcontract.

3. Direct Subcontract Awards are those that are identified with the performance of one or more specific Government contract(s).

4. Indirect Subcontract Awards are those which, because of incurrence for common or joint purposes, are not identified with specific Government contracts; these awards are related to Government contract performance but remain for allocation after direct awards have been determined and identified to specific Government contracts.

SUBMITTAL ADDRESSES FOR ORIGINAL REPORT

For DOD Contractors, send reports to the cognizant contract administration office as stated in the contract.

For Civilian Agency Contractors, send reports to awarding agency:

1. NASA: Forward reports to NASA, Office of Procurement (HCL), Washington, DC 20546
2. OTHER FEDERAL DEPARTMENTS OR AGENCIES: Forward report to the OSOBU Director unless otherwise provided for in instructions by the Department or Agency.

FOR ALL CONTRACTORS:

SMALL BUSINESS ADMINISTRATION (SBA): Send "info copy" to the cognizant Commercial Market Representative (CMR) at the address provided by SBA. Call SBA Headquarters in Washington, DC at (202) 205-8475 for correct address if unknown.

2. Commercial plan means a subcontracting plan covering the offeror's fiscal year and which is applicable to the entire production of commercial items sold by either SDB or large of

(Billing Code 6820-34-P)

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 11, 19, 52, and 53

[FAR Case 89-042]

Federal Acquisition Regulation;
Liquidated Damages

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and the National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council are proposing to amend the Federal Acquisition Regulation (FAR) Parts 19, 52, and 53 to clarify policy on liquidated damages and commercial subcontracting plans and implement OFPP Policy Letter 95-1, Subcontracting Plans for Companies Supplying Commercial Items. *Include major/non major statement*

DATES: Comments on the proposed rule should be submitted in writing to the FAR Secretariat at the address shown below on or before (60 days after publication) to be considered in the formulation of the final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (VRS), 18th and F Streets, NW, Room 4037, Washington, D.C. 20405. Please cite FAR Case 89-042 in all correspondence related to this issue.

FOR FURTHER INFORMATION CONTACT: For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, D.C. 20405 (202) 501-4755. Please cite FAR Case 89-042.

SUPPLEMENTARY INFORMATION:

A. BACKGROUND

An interim rule was published on July 21, 1989 (54 FR 30708), to require a prime contractor to pay liquidated damages upon a finding of lack of good faith effort to meet its small business subcontracting goals. This rule implemented Section 304 of the Business Opportunity Development Reform Act of 1988, Pub. L. 100-656.

Significant revisions to the interim rule were proposed based on analysis of public comments. Extensive discussions took place regarding long-standing problems of trying to extend and adapt the requirement of Section 8(d) of the Small Business Act to contracts for commercial products, now compounded by the introduction of liquidated damages. To resolve those problems, the case has been held pending release and conformance to ~~the~~ FAC 90-32, published on

62-58

September 18, 1995 (60 FR 48231); "Acquisition of Commercial Items," and ~~the~~ OFPP Policy Letter 95-1, "Subcontracting Plans for Companies Supplying Commercial Items."

B. Regulatory Flexibility Act

The proposed rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because small businesses are exempt from subcontracting plan requirements per FAR 19.702(b).

C. Paperwork Reduction Act

The Paperwork Reduction Act applies, the proposed rule requires contractors to submit SF 295 report on both a contractor and government fiscal year basis, as well as to supply some additional information. The SF 295 is currently cleared under OMB # 9000-0007. Updated information for the Department of Defense follows:

	Updated Current	Addition for FAR Case 89-042	Revised DoD Est.
Estimated respondents	1554		1554
Average responses annually	4		4
Total annual responses	*5823	100	*5823
Estimated hours/response	16.23	.08	16.51
Total hours	95,672		97,789

* The above two lines do not multiply to equal total annual responses because SF 295s for commercial plans are submitted annually and all others quarterly. Our data includes an estimate of 231 commercial plans, with an increase of 100 due to the requirement for contractors to

Not
Pertinent
to
FAR

6359

report both on their fiscal year and the government fiscal year. We estimated an additional 2 hours per commercial plan based on this case.

11/19/91
List of Subjects in 48 CFR Parts ~~45~~ 52, and 53

Government procurement.

Post-It™ brand fax transmittal memo 7571		# of pages 43
To CAAC	From DAR	
Co.	Co.	
Dept.	Phone #	
Fax #	Fax #	

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PAPERWORK REDUCTION ACT SUBMISSION

Please read the instructions before completing this form. For additional forms or assistance in completing this form, contact your agency's Paperwork Clearance Officer. Send two copies of this form, the collection instrument to be reviewed, the Supporting Statement, and any additional documentation to: Office of Information and Regulatory Affairs, Office of Management and Budget, Document Library, Room 10102, 725 17th Street NW Washington, DC 20503.

1. Agency/Subagency originating request <u>DOD/GSA/NASA-FAR Secretariat</u>		2. OMB control number <u>9000-0006</u>	
3. Type of information collection (check one) a. <input type="checkbox"/> New collection b. <input checked="" type="checkbox"/> Revision of a currently approved collection c. <input type="checkbox"/> Extension of a currently approved collection d. <input type="checkbox"/> Reinstatement, without change, of a previously approved collection for which approval has expired e. <input type="checkbox"/> Reinstatement, with change, of a previously approved collection for which approval has expired f. <input type="checkbox"/> Existing collection in use without an OMB control number For b-f, note item A2 of Supporting Statement instructions		4. Type of review requested (check one) a. <input checked="" type="checkbox"/> Regular b. <input type="checkbox"/> Emergency - Approval requested by: _____ c. <input type="checkbox"/> Delegated 5. Small entities Will this information collection have a significant economic impact on a substantial number of small entities? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No 6. Requested expiration date a. <input type="checkbox"/> Three years from approval date b. <input type="checkbox"/> Other Specify: _____	
7. Title <u>Subcontracting Plans/Subcontracting Report for Individual Contracts (SF 294) FAR Case 89-42 FAR Sections Affected: Subpart 19.7, 52.2 9-</u>			
8. Agency form number(s) (if applicable) <u>SF 294</u>			
9. Keywords <u>Government Procurement</u>			
10. Abstract Public Law 95-507 requires that contracts over specified thresholds contain a subcontracting plan with goals for subcontracting with small, small disadvantaged, and women-owned small business concerns. The requirements of the plan are set forth in the Small Business Act. The SF 294 report is used to monitor the contractor's performance against the goals in its plan.			
11. Affected public (Mark primary with "P" and all others that apply with "X") a. <input checked="" type="checkbox"/> Individuals or households b. <input checked="" type="checkbox"/> Business or other for-profit c. <input checked="" type="checkbox"/> Not-for-profit institutions d. <input type="checkbox"/> Farms e. <input type="checkbox"/> Federal Government f. <input type="checkbox"/> State, Local or Tribal Government		12. Obligation to respond (Mark primary with "P" and all others that apply with "X") a. <input type="checkbox"/> Voluntary b. <input checked="" type="checkbox"/> Required to obtain or retain benefits c. <input type="checkbox"/> Mandatory	
13. Annual reporting and recordkeeping hour burden a. Number of respondents <u>11,25</u> b. Total annual responses <u>59,200</u> 1. Percentage of these responses collected electronically <u>5</u> % c. Total annual hours requested <u>592,580</u> d. Current OMB inventory <u>593,825</u> e. Difference <u>3,755</u> f. Explanation of difference 1. Program change <u>+ 3,755</u> 2. Adjustment		14. Annual reporting and recordkeeping cost burden (in thousands of dollars) a. Total annualized capital/startup costs <u>0</u> b. Total annual costs (O&M) <u>0</u> c. Total annualized cost requested <u>0</u> d. Current OMB inventory <u>0</u> e. Difference f. Explanation of difference 1. Program change 2. Adjustment	
15. Purpose of information collection (Mark primary with "P" and all others that apply with "X") a. <input checked="" type="checkbox"/> Application for benefits b. <input checked="" type="checkbox"/> Program evaluation c. <input type="checkbox"/> General purpose statistics d. <input type="checkbox"/> Audit e. <input checked="" type="checkbox"/> Program planning or management f. <input type="checkbox"/> Research g. <input checked="" type="checkbox"/> Regulatory or compliance		16. Frequency of recordkeeping or reporting (check all that apply) a. <input checked="" type="checkbox"/> Recordkeeping b. <input type="checkbox"/> Third party disclosures c. <input checked="" type="checkbox"/> Reporting 1. <input type="checkbox"/> On occasion 2. <input type="checkbox"/> Weekly 3. <input type="checkbox"/> Monthly 4. <input type="checkbox"/> Quarterly 5. <input checked="" type="checkbox"/> Semi-annually 6. <input type="checkbox"/> Annually 7. <input type="checkbox"/> Biennially 8. <input checked="" type="checkbox"/> Other (describe) <u>per contract</u>	
17. Statistical methods Does this information collection employ statistical methods? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		18. Agency contact (Person who can best answer questions regarding the content of this submission) Name: <u>LINDA KLEIN</u> Phone: <u>202 501-3775</u>	

19. Certification for Paperwork Reduction Act Submissions

On behalf of this Federal agency, I certify that the collection of information encompassed by this request complies with 5 CFR 1320.9.

NOTE: The text of 5 CFR 1320.9, and the related provisions of 5 CFR 1320.8 (b) (3), appear at the end of the instructions. *The certification is to be made with reference to those regulatory provisions as set forth in the instructions.*

The following is a summary of the topics, regarding the proposed collection of information, that the certification covers:

- (a) It is necessary for the proper performance of agency functions;
- (b) It avoids unnecessary duplication;
- (c) It reduces burden on small entities;
- (d) It uses plain, coherent, and unambiguous terminology that is understandable to respondents;
- (e) Its implementation will be consistent and compatible with current reporting and recordkeeping practices;
- (f) It indicates the retention periods for recordkeeping requirements;
- (g) It informs respondents of the information called for under 5 CFR 1320.8 (b) (3):
 - (i) Why the information is being collected;
 - (ii) Use of information;
 - (iii) Burden estimate;
 - (iv) Nature of response (voluntary, required for a benefit, or mandatory);
 - (v) Nature and extent of confidentiality; and
 - (vi) Need to display currently valid OMB control number.
- (h) It was developed by an office that has planned and allocated resources for the efficient and effective management and use of the information to be collected (see note in Item 19 of the instructions);
- (i) It uses effective and efficient statistical survey methodology; and
- (j) It makes appropriate use of information technology.

If you are unable to certify compliance with any of these provisions, identify the item below and explain the reason in Item 18 of the Supporting Statement.

Signature of Senior Official or designee

Date

December 4, 1996 (revised)

SUPPORTING STATEMENT FOR 9000-0006
SUBCONTRACTING PLANS/SUBCONTRACTING REPORT
FOR INDIVIDUAL CONTRACTS (STANDARD FORM 294)
FAR CASE 89-42, LIQUIDATED DAMAGES

A. Justification.

1. In accordance with the Small Business Act (15 U.S.C. 631, et seq.), contractors receiving a contract for more than \$10,000 agree to have small business, small disadvantaged business, and women-owned small business concerns participate in the performance of the contract as far as practicable. Contractors receiving a contract or a modification to a contract expected to exceed \$500,000 (\$1,000,000 for construction) must submit a subcontracting plan that provides maximum practicable opportunities for small, small disadvantaged business concerns, and women-owned small businesses. Specific elements required to be included in the plan are specified in section 8(d) of the Small Business Act and implemented in FAR subpart 19.7.

In conjunction with these plans, contractors must submit semiannual reports of their progress on Standard Form 294, Subcontracting Report for Individual Contracts.

This proposed rule implements Section 304 of the Business Opportunity Development Reform Act of 1988, Pub. L. 100-656. Section 304 of the statute requires a prime contractor to pay liquidated damages upon a finding of "lack of good faith effort" in meeting its small business subcontracting goals. It further implements OFPP's Policy Letter 95-1, Subcontracting Plans for Companies Supplying Commercial Items, and a draft policy letter entitled, "Subcontracting Plans."

The rule does this, in part, by adding to the subcontracting plan requirements, the following additional requirements:

(1) A statement of total dollars planned to be subcontracted and a statement of the total dollars planned to be subcontracted to small, small disadvantaged and women-owned small business concerns.

(2) A description of the principal types of supplies and services to be subcontracted and an identification of the

types planned for subcontracting to small, small disadvantaged and women-owned small business concerns.

(3) A description of the methods used to develop the subcontracting goals.

(4) A description of the methods used to identify potential sources of solicitation purposes.

(5) A statement as to whether or not the offeror included indirect costs in establishing subcontracting goals, and a description of the method used to determine the proportionate share of indirect costs to be incurred with small, small disadvantaged and women-owned small business concerns.

2. A satisfactory subcontracting plan is required before a contract exceeding \$500,000 (\$1,000,000 for construction) can be awarded. The contracting officer must examine the information in the proposed plan to determine if the plan is in compliance with the Small Business Act and the FAR. In addition, the information is used for policy and management control purposes.

Information submitted on Standard Form 294 is used to assess contractors' compliance with their subcontracting plans.

3. Use of improved information technology will not reduce the burden of providing this information.

4. Submission of duplicate plans covering commercial items has been eliminated by the use of Commercial Plans covering company-wide production rather than a particular contract. Reporting under Commercial Plans is done on the SF 295. Information similar to that submitted on the SF 294 is not already available to the contracting officer.

5. Small businesses are not required to submit subcontracting plans or reports.

6. Collection of information related to the plan must be done prior to award of the contract. Under sealed bid solicitations, plans must be submitted with bids so that all firms can be evaluated equally. Plans under negotiated acquisitions may be required only from the firm(s) being considered for award or, if the contracting officer determines it necessary, submitted with initial offers.

7. Collection of information is consistent with guidelines in 5 CFR 1320.5 guidelines.

8. An interim rule was published on July 21, 1989 (54 FR 30708), to require a prime contractor to pay liquidated damages upon a finding of lack of good faith effort to meet its small business subcontracting goals. The rule implemented Section 304 of the Business Opportunity Development Reform Act of 1988, Pub. L. 100-656. It did not include an OMB clearance. Significant revisions to the interim rule were proposed as a result of the public comments received on the rule. In addition, the rule has been further revised to implement the aforementioned policy letters. Because of the substantive changes, the rule is being republished as a proposed rule and now includes a revision to OMB clearance 9000-0006.

9. Explain any decision to provide any payment or gift to respondents, other than reenumeration of contractors or grantees. Not applicable.

10. This information will be disclosed only to the extent consistent with prudent business practices and current regulatory and statutory requirements.

11. No sensitive questions are involved.

12 - 13. Estimated Burden and Cost to the Public. Time required for reading and preparing information is estimated as follows:

For Submission of SF 294 Report

Estimated respondents	1,200
Average responses annually	x 22
Total annual responses	26,400
Estimated hrs/response	x 2.2
Total hours for SF 294	58,080
Hourly rate	x \$42
Total cost	\$2,439,360

For Development of Plan

Number of respondents	1,625
Average responses per year	x 14
Number of plans per year	22,750
Hours per plan	x 15.5
Total hours	352,625
Hourly rate	x \$42
Total cost	\$14,810,250

For Recordkeeping

Number of recordkeepers	1,625
Annual hours per recordkeeper	x 115
Total hours	186,875

14. Estimated Cost to the Government.

Annual recordkeeping burden and cost:

Number of responses per year	49,150
Hours per response	x 8
Total hours	393,200
Hourly rate (including overhead)	x \$40
Total cost	\$15,728,000

15. The change in burden reflects the additional requirements that a subcontracting plan must include, which are being added to the Federal Acquisition Regulation under FAR Case 89-42. They are:

(1) A statement of total dollars planned to be subcontracted and a statement of the total dollars planned to be subcontracted to small, small disadvantaged and women-owned small business concerns.

(2) A description of the principal types of supplies and services to be subcontracted and an identification of the types planned for subcontracting to small, small disadvantaged and women-owned small business concerns.

(3) A description of the methods used to develop the subcontracting goals.

(4) A description of the methods used to identify potential sources for solicitation purposes.

(5) A statement as to whether or not the offeror included indirect costs in establishing subcontracting goals, and a description of the method used to determine the proportionate share of indirect costs to be incurred with small, small disadvantaged and women-owned small business concerns.

As a result of the above, there is an increase of 11, 375 burden hours associated with the increase in "plan" requirements. This rule also results in burden hours associated with reports against plans on the SF 294. There is a decrease of 7,620 hours because of an increased reliance

on company wide plans for commercial products under which the SF 294 is not submitted.

16. Statistical methods are not used in this information collection.



General Services Administration
Office of Acquisition Policy
Washington, DC 20405

40th Anniversary
FAR Case 89-01
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FILE COPY

July 20, 1989

CIVILIAN AGENCY ACQUISITION COUNCIL LETTER NO. 89-6

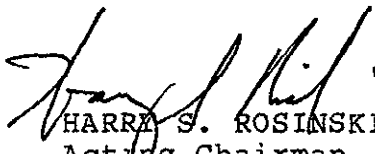
TO: Civilian Agencies Other than NASA

SUBJECT: Federal Acquisition Circular (FAC) 84-50, Liquidated Damages

This CAAC Letter provides a copy of the FAR revisions being issued under FAC 84-50 for your immediate use. The FAC was published in the Federal Register as an interim rule on July 21, 1989. A copy of the FAR coverage is attached.

FAC 84-50 implements section 304 of the Business Opportunity Development Reform Act of 1988 (Pub. L. 100-656), which, among other things, requires a prime contractor to pay liquidated damages upon a finding of lack of good faith effort to meet its small business subcontracting goals.

The FAC includes a new clause, Liquidated Damages (FAR 52.219-16) which must be included in all contracts awarded on or after August 15, 1989. Distribution of this CAAC Letter in advance of the loose-leaf FAR coverage is necessary to provide contracting officers sufficient time to amend solicitations to include the clause.


HARRY S. ROSINSKI
Acting Chairman
Civilian Agency
Acquisition Council

Enclosure

Federal Acquisition Circular (FAC) 84-50 amends the Federal Acquisition Regulation (FAR) as specified below.

ITEM—LIQUIDATED DAMAGES

FAR 19.701, 19.702, 19.705-4, 19.705-6, 19.706, 19.708 are revised and 19.705-7 and the clause at 52.219-16 are added to implement section 304 of the Business Opportunity Development Reform Act of 1988 (Pub. L. 100-656) which, among other things, requires a prime contractor to pay liquidated damages upon a finding of lack of good faith effort to meet its small business subcontracting goals. The contracting officer's final decision is expressly made subject to the Contract Disputes Act.

Liquidated damages will be assessed at the actual dollar amount by which the contractor failed to achieve each subcontract goal. Such damages may be in addition to any other remedies the Government may have under the contract.

These changes apply to contracts awarded on or after August 15, 1989.

Therefore, 48 CFR Parts 19 and 52 are amended as set forth below:

1 The authority citation for 48 CFR Parts 19 and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137, and 42 U.S.C. 2473(c).

PART 19—SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS CONCERNS

2. Section 19.701 is amended by alphabetically adding the definition "Failure to make a good faith effort to comply with the subcontracting plan," to read as follows:

19.701 Definitions.

"Failure to make a good faith effort to comply with the subcontracting plan," as used in this subpart, means willful or intentional failure to perform in accordance with the requirements of the subcontracting plan, or willful or intentional action to frustrate the plan.

* * * * *

3 Section 19.702 is amended by revising paragraph (c) to read as follows:

19.702 Statutory requirements.

* * * * *

(c) As stated in 15 U.S.C. 637(d)(8), any contractor or subcontractor failing to comply in good faith with the requirements of the subcontracting plan is in material breach of its contract. Further, 15 U.S.C. 637(d)(4)(F) directs that a contractor's failure to make a good faith effort to comply with the requirements of the subcontracting plan shall result in the imposition of liquidated damages.

4. Section 19.705-4 is amended by revising paragraph (c); by redesignating existing paragraphs (d)(2), (3), (4), and (5) as (d)(3), (4), (5), and (6); and by adding a new (d)(2) to read as follows.

19.705-4 Reviewing the subcontracting plan.

* * * * *

(c) In negotiated acquisitions, the contracting officer shall determine whether the plan is acceptable based on the negotiation of each of the six elements of the plan (see 19.704). Subcontracting goals should be set at a level that the parties reasonably expect can result from the offeror expending good faith efforts to use small and small disadvantaged subcontractors to the maximum practicable extent. Particular attention should be paid to the identification of steps that, if taken, would be considered a good faith effort. No goal should be negotiated upward if it is apparent that a higher goal will significantly increase the Government's cost or seriously impede the attainment of acquisition objectives. An incentive subcontracting clause (see 52.219-10, Incentive Subcontracting Program for Small and Small Disadvantaged Business Concerns) may be used when additional and unique contractor effort could significantly increase subcontract awards to small or small disadvantaged businesses.

(d) * * *

(2) In accordance with 15 U.S.C. 637(d)(4)(F)(iii), ensure that

the goals offered are attainable in relation to—

(i) The subcontracting opportunities available to the contractor, commensurate with the efficient and economical performance of the contract;

(ii) The pool of eligible subcontractors available to fulfill the subcontracting opportunities; and

(iii) The actual performance of such contractor in fulfilling the subcontracting goals specified in prior plans

* * * * *

5 Section 19.705-6 is amended by adding paragraph (f) to read as follows:

19.705-6 Postaward responsibilities of the contracting officer.

* * * * *

(f) Initiating action to assess liquidated damages in accordance with 19.705-7 upon a recommendation by the administrative contracting officer or receipt of other reliable evidence to indicate that such action is warranted.

6. Section 19.705-7 is added to read as follows:

19.705-7 Liquidated damages

(a) Maximum practicable utilization of small and small disadvantaged business concerns as subcontractors in Government contracts is a matter of national interest with both social and economic benefits. When a contractor fails to make a good faith effort to comply with a subcontracting plan, these objectives are not achieved, and 15 U.S.C. 637(d)(4)(F) directs that liquidated damages shall be paid by the contractor.

(b) The amount of damages attributable to the contractor's failure to comply shall be an amount equal to the actual dollar amount by which the contractor failed to achieve each subcontract goal or, in the case of a commercial products plan, shall be that portion of the dollar amount allocable to Government contracts by which the contractor failed to achieve each subcontract goal.

(c) If, at contract completion, or in the case of a commercial products plan, at the close of the fiscal year for which the plan is applicable, a contractor has failed to meet its subcontracting goals and the contracting officer decides in accordance with paragraph (d) of this subsection that the contractor failed to make a good faith effort to comply with its subcontracting plan, the contracting officer shall give the contractor written notice specifying the failure, advising the contractor of the possibility that the contractor may have to pay to the Government liquidated damages, and providing a period of 10 days (or longer period as necessary) within which to respond. The notice shall give the contractor an opportunity to demonstrate what good faith efforts have been made before the contracting officer issues the final decision, and shall further state that failure of the contractor to respond may be taken as an admission that no valid explanation exists. When appropriate, the notice may invite the contractor to discuss the matter.

(d) In determining whether a contractor failed to make a good faith effort to comply with its subcontracting plan, a contracting officer must look to the totality of the contractor's actions, consistent with the information and assurances provided in its plan. The fact that the contractor failed to meet its subcontracting goals does not, in and of itself, constitute a failure to make a good faith effort. For example, notwithstanding a contractor's diligent effort to identify and solicit offers from small business and small disadvantaged business concerns, factors such as unavailability of anticipated sources or unreasonable prices may frustrate achievement of the contractor's goals. However, when considered in the context of the contractor's total effort in accordance with its plan, the following may be considered as indicia of a failure to make a good faith effort: a failure to attempt to identify, contact, solicit, or consider for contract award, small business or small disadvantaged business concerns; a failure to designate a company official to administer the subcontracting program; a failure to maintain records or otherwise demonstrate procedures adopted to comply with the plan; and the adoption of company policies or procedures which have as their objectives the frustration of the objectives of the plan.

(c) If, after consideration of all the pertinent data, the contracting officer finds that the contractor failed to make a good faith effort to comply with its subcontracting plan, the contracting officer shall issue a final decision to the contractor to that effect and require the payment of liquidated damages in an amount stated. The contracting officer's final decision shall state that the contractor has the right to appeal under the clause in the contract entitled Disputes.

(f) With respect to commercial products plans, i.e., company-wide or division-wide subcontracting plans approved under paragraph (g) of the clause in the contract entitled Small Business and Small Disadvantaged Business Subcontracting Plan, the contracting officer of the agency that originally approved the plan will exercise the functions of the contracting officer under this subsection on behalf of all agencies that awarded contracts covered by that commercial products plan.

(g) Liquidated damages shall be in addition to any other remedies that the Government may have.

7 Section 19.706 is amended by removing at the end of paragraph (a)(4) the word "and"; by removing at the end of paragraph (a)(5) the period and inserting in its place "; and"; and by adding paragraph (a)(6) to read as follows:

19.706 Responsibilities of the cognizant administrative contracting officer.

* * * * *

(a) * * *

(6) Immediate notice and rationale if, during performance, the contractor is failing to comply in good faith with the subcontracting plan.

* * * * *

8. Section 19.708 is amended by redesignating existing paragraph (b) as new (b)(1); by redesignating existing (b)(1), (2), and (3) as (b)(1)(i), (ii), and (iii); and by adding a new paragraph (b)(2) to read as follows:

19.708 Solicitation provisions and contract clauses

* * * * *

(b) * * *

(2) The contracting officer shall insert the clause at 52 219-16, Liquidated Damages—Small Business Subcontracting Plan, in all solicitations and contracts containing the clause at 52 219-9, Small Business and Small Disadvantaged Business Subcontracting Plan, or its Alternate I.

* * * * *

PART 52—SOLICITATIONS PROVISIONS AND CONTRACT CLAUSES

9. Section 52.219-16 is added to read as follows:

52 219-16 Liquidated Damages—Small Business Subcontracting Plan.

As prescribed in 19.708(b)(2), insert the following clause:

LIQUIDATED DAMAGES—SMALL BUSINESS SUBCONTRACTING PLAN (AUG 1989)

(a) "Failure to make a good faith effort to comply with the subcontracting plan," as used in this clause, means a willful or intentional failure to perform in accordance with the requirements of the subcontracting plan approved under the clause in this contract entitled "Small Business and Small Disadvantaged Business Subcontracting Plan," or willful or intentional action to frustrate the plan.

(b) If, at contract completion, or in the case of a commercial products plan, at the close of the fiscal year for which the plan is applicable, the Contractor has failed to meet its subcontracting goals and the Contracting Officer decides in accordance with paragraph (c) of this clause that the Contractor failed to make a good faith effort to comply with its subcontracting plan, established in accordance with the clause in

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this contract entitled Small and Small Disadvantaged Business Subcontracting Plans, the Contractor shall pay the Government liquidated damages in an amount stated. The amount of damages attributable to the Contractor's failure to comply shall be an amount equal to the actual dollar amount by which the Contractor failed to achieve each subcontract goal or, in the case of a commercial products plan, that portion of the dollar amount allocable to Government contracts by which the Contractor failed to achieve each subcontract goal.

(c) Before the Contracting Officer makes a final decision that the Contractor has failed to make such good faith effort, the Contracting Officer shall give the Contractor written notice specifying the failure and permitting the Contractor to demonstrate what good faith efforts have been made. Failure to respond to the notice may be taken as an admission that no valid explanation exists. If, after consideration of all the pertinent data, the Contracting Officer finds that the Contractor failed to make a good faith effort to comply with the subcontracting plan, the Contracting Officer shall issue a final decision to that effect and require that the Contractor pay the Government liquidated damages as provided in paragraph (b) of this clause.

(d) With respect to commercial products plans, i.e., company-wide or division-wide subcontracting plans approved under paragraph (g) of the clause in this contract entitled, Small Business and Small Disadvantaged Business Subcontracting Plan, the Contracting Officer of the agency that originally approved the plan will exercise the functions of the Contracting Officer under this clause on behalf of all agencies that awarded contracts covered by that commercial products plan.

(e) The Contractor shall have the right of appeal, under the clause in this contract entitled Disputes, from any final decision of the Contracting Officer.

(f) Liquidated damages shall be in addition to any other remedies that the Government may have.
(End of clause)



General Services Administration
Office of Acquisition Policy
Washington, DC 20405



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July 14, 1989


CIVILIAN AGENCY ACQUISITION COUNCIL
LETTER NO. 89-5

TO: Civilian Agencies, other than NASA

SUBJECT: Current Interest Rate

The Secretary of the Treasury has established an interest rate of 9-1/8 percent for the 6-month period beginning July 1, 1989, and ending December 31, 1989, pursuant to section 105 (b) (2) of the Renegotiation Act of 1951, as amended by Pub. L. 92-41, dated July 1, 1971. A copy of the Department of the Treasury, June 28, 1989, Federal Register notice (54 FR 27266) is enclosed.

This interest rate is used in computing amounts paid by or to the Government under the Contract Disputes Act of 1978; the Prompt Payment Act; and the various payment requirements throughout the FAR. For example, see 30.414-40(b), 30.414-50(b), 30.415-50(d)(5), 30.415-60(b), 30.416-50(a)(3)(ii), 30.417-50(a)(1), 31.205-10(a)(1)(ii), 31.205-19(a)(3)(i), 32.407(a)(2), 32.407(b), 32.610(b)(2), 32.613(1), 32.614-1(c), 32.907-1(d), 33.208, 49.112-1(g), 49.603-3(b)(7)(xiv), 52.230-3(a)(5), 52.230-5(a)(4), 52.230-6, 52.232-12(f)(3), 52.232-17(a), 52.232-25(a)(6), 52.232-26(a)(5), 52.232-27(a)(4), 52.232-27(c)(2)(ii), 52.232-27(e)(4)(ii), 52.232-27(f)(2), 52.233-1(g), 52.249-2(1)(2), 52.249-3(1)(2), 52.249-6(1)(2), and 52.249-11(j)(2).


HARRY S. ROSINSKI
Acting Chairman
Civilian Agency
Acquisition Council

Enclosure

DEPARTMENT OF THE TREASURY

Fiscal Service

**Renegotiation Board Interest Rate;
Prompt Payment Interest Rate;
Contracts Disputes Act**

Although the Renegotiation Board is no longer in existence, other Federal Agencies are required to use interest rates computed under the criteria established by the Renegotiation Act of 1971 (Pub. L. 95-41). For example, the Contracts Disputes Act of 1978 (P.O. 92-563) and the Prompt Payment Act (Pub. L. 97-177) are required to calculate interest due on claims " * * " at a rate established by the Secretary of the Treasury pursuant to Pub. L. 92-41 (85 Stat. 97) for the Renegotiation Board "

Therefore, notice is hereby given that, pursuant to the above mentioned sections, the Secretary of the Treasury has determined that the rate of interest applicable for the purpose of said sections, for the period beginning July 1, 1989 and ending on December 31, 1989, is 9-1/8 per centum per annum.

Dated June 21, 1989

Gerald Murphy,

Fiscal Assistant Secretary

[FR Doc 89-15265 Filed 6-27-89, 8 45 am]

BILLING CODE 4810-35-M

JAN 17 1989

file: FAR Case
89-1

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CIVILIAN AGENCY ACQUISITION COUNCIL
LETTER NO. 89-1

TO: Civilian Agencies, other than NASA

SUBJECT: Current Interest Rate

The Secretary of the Treasury has established an interest rate of 9-3/4 percent for the 6-month period beginning January 1, 1989, and ending June 30, 1989, pursuant to section 105 (b)(2) of the Renegotiation Act of 1951, as amended by Pub. L. 92-41, dated July 1, 1971. A copy of the Department of the Treasury, December 30, 1988, Federal Register notice (53 FR 53117) is enclosed.

This interest rate is used in computing amounts paid by or to the Government under the Contract Disputes Act of 1978; the Prompt Payment Act; and the various payment requirements throughout the FAR at 30.414-40(b), 30.414-50(b), 30.415-50(d)(5), 30.415-60(b), 30.416-50(a)(3)(ii), 30.417-50(a)(1), 31.205-10(a)(1)(ii), 31.205-19(a)(3)(i), 32.407(a)(2), 32.407(b), 32.610(b)(2), 32.613(1), 32.614-1(c), 32.907-1(d), 33.208, 49.112-1(g), 49.603-3(b)(7)(xiv), 52.230-3(a)(5), 52.230-5(a)(4), 52.230-6, 52.232-12(f)(3), 52.232-17(a), 52.232-25(a)(6), 52.232-25(a)(5)(Alternate I), 52.233-1(g), 52.249-2(1)(2), 52.249-3(1)(2), 52.249-6(1)(2), and 52.249-11(j)(2).

(signed) Harry S. Rosinski

HARRY S. ROSINSKI
Acting Chairman,
Civilian Agency
Acquisition Council

Enclosure

cc: Official File - VR, Reading File - VRR, VR, V(2)
VRR: [Signature] Davison:dg:1/10/89 (CAAC Letter 89-1)

Concurrences: LG [Signature] / Tom Brooke 1/18/89

VRR [Signature] / Jerry Olson